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In The

Supreme Court of the United States

SARAH ILLIG and GALE ILLIG
(for themselves and as representatives
of a class of similarly situated persons),

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the law of Missouri and other states, when a rail carrier converts a railroad easement to a non-railroad use, the easement is deemed abandoned, and it reverts to the owner of the servient estate. If the rail carrier and a recreational trail operator agree to convert the railroad easement to a public recreational trail, however, a federal statute commonly known as the "Trails Act" blocks the reversion that would otherwise occur under state law, thereby depriving the servient landowner of unencumbered ownership and in effect creating a new recreational easement. This Court held unanimously in *Preseault v. ICC*, 494 U.S. 1 (1990), that the Trails Act effects a taking of the servient landowner's property when such a "rail-to-trails" conversion occurs in contravention of state law.

The question presented here is whether a divided panel of the Federal Circuit erred in holding that a Trails Act takings claim accrues, and the statute of limitations thus begins to run, when the Surface Transportation Board permits the rail carrier and the trail operator to negotiate a trail-use agreement rather than when, if the negotiations succeed, they actually enter into such an agreement and thus convert the railroad easement to trail use.

PARTIES TO THE PROCEEDING

Counsel for the Petitioners, Gale Illig and Sarah Illig, *et al.* certifies that the name of every party represented by Petitioners' counsel is as follows:

Mr. Howard G. Bramoweth, Trustee of the Molly Bramoweth Declaration of Trust

Ms. Jane C. Burget

Mr. and Mrs. Robert E. Niebruegge

Mr. and Mrs. Thomas J. Downey

Mr. and Mrs. John W. Cary

Mr. and Mrs. Arthur L. Hartmann

Mr. and Mrs. William C. Svejkovsky, Jr., Trustee of the William C. and Marie Svejkovsky Joint Revocable Living Trust Agreement

Mr. and Mrs. Herbert E. Vanausdoll

Mr. and Mrs. Ronald A. Dirsa

Ms. Bill G. Gorman

Mr. and Mrs. Frederick A. Feltmann

Mr. and Mrs. John Sapienza

Mr. and Mrs. John M. Saguto

Mr. Randall L. Eisenbeis

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PARTIES TO THE PROCEEDING – Continued

Ms. Mary Ellen Libera

Mr. David Beck

Ms. Michele Nieuwendaal

Mr. and Mrs. Carrol E. Maas

Mr. and Mrs. Paul Salvage

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Ms. Betty J. Foster

Ms. Kathleen L. Jablonski

Mr. and Mrs. Kenneth M. Wilhelms

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Ms. Betty Mae R. Steinhans

Mr. and Mrs. Craig L. Voss

Mr. Joseph Antonacci

Mr. Walter Stuenkel

Mr. and Mrs. Robert Jackson

Mr. Nicholas Horwath, Jr.

Kadima Properties, LLC

Metropolitan Sewer District

Mr. and Mrs. James A. Feldewerth

Mr. and Mrs. Ronald P. Liebler

Mr. and Mrs. Carl W. Allen

PARTIES TO THE PROCEEDING – Continued

Mr. and Mrs. William D. Hibdon

Mr. Joseph W. Schott

Mr. and Mrs. Walter A. Kempter

Mr. Kenneth F. Lewis

Mrs. Diane Kaminsky

Mr. and Mrs. Fred C. Sorden

Mr. and Mrs. Jimmie M. Smith

Mr. and Mrs. Martin C. Templin

Mr. and Mrs. Greg L. Taff

Mr. and Mrs. Brenda M. Brinkman

Mr. and Mrs. Ervin A. Pfeiffer

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Ms. Donna J. Laudicina

Mr. and Mrs. Robert H. Young

Ms. Frances M. Rimmer

Mr. and Mrs. William A. Bedo

Ms. Louise Obermeier Moore

PARTIES TO THE PROCEEDING – Continued

Mr. and Mrs. Noel Atherton

Mr. Joseph J. Mackle, Jr., Trustee of the Estate of Roberta Mackle

Mr. Ronald S. Carter

Mr. and Mrs. John Sinnwell

Ms. Anita L. Noto

Mr. and Mrs. William J. McKenna

Mr. Harold E. Burian

Ms. Mary Kathryn England

Mr. and Mrs. Frank Scotino

Ms. Patricia Ebel

Mr. and Mrs. Robert L. Staely

Mr. and Mrs. Thomas Holstein

Estate of Emilie Hummel

Mr. and Mrs. Robert W. Overkamp

Ms. Rosemarie Saar

Mr. George Simon

Sunset Memorial Park, Inc.

Ms. Berenice Vescovo

Mr. and Mrs. Gale Illig

CORPORATE DISCLOSURE STATEMENT

Counsel certifies that only one petitioner is a corporation with a parent corporation or is a corporation ten percent or more of whose stock is owned by a publicly held corporation. Specifically, Albaca, Inc., is either the parent corporation of petitioner Sunset Memorial Park, Inc., or a publicly held company that owns ten percent or more of the stock of petitioner Sunset Memorial Park, Inc.

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PETITION FOR A WRIT OF CERTIORARI

On behalf of themselves and a class of similarly situated persons, Sarah and Gale Illig respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Federal Circuit (App., *infra*, 1a-4a) is reported at 274 Fed. Appx. 883. The order of the Federal Circuit denying the Illigs' petition for rehearing *en banc* (App. 112a-13a) is unreported. The opinion of the United States Court of Federal Claims dismissing the Illigs' claim (App. 5a-29a) is reported at 67 Fed. Cl. 47. The earlier orders of the trial court denying the government's motion to dismiss (App. 42a-47a) and granting petitioners' motion for partial summary judgment with respect to the named plaintiffs (App. 40a-41a) and with respect to all class members (App. 38a-39a) are unreported.

JURISDICTION

This claim arises under the Tucker Act, 28 U.S.C. § 1491. The jurisdiction of the Federal Circuit was invoked under 28 U.S.C. § 1295(a)(3). The Federal Circuit's order denying the Illigs' timely petition for rehearing *en banc* was entered on October 1, 2008.

App. 112a-13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V, cl. 4 ("Takings Clause").

Section 2501 of Title 28 of the United States Code provides in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Reproduced in the appendix are section 8(d) the National Trails System Act ("Trails Act" or "Act") (codified at 16 U.S.C. § 1247(d)) (App. 114a-16a) and 49 C.F.R. § 1152.29 (App. 117a-25a).

STATEMENT OF THE CASE

This case raises an important and recurring question relating to when a claim for a taking of real property accrues. Petitioners are landowners whose property has been encumbered by a right-of-way easement used by a rail carrier. When the rail carrier no longer wanted the easement, the carrier converted

the easement into a public recreational trail and transferred it to a trail operator. Under the normal operation of state law, this conversion would have resulted in the abandonment of the easement and its reversion to petitioners. But section 8(d) the National Trails System Act ("Trails Act" or "Act") (codified at 16 U.S.C. § 1247(d)) blocked this reversion of the easement so that the trail operator would have the easement to use as a trail. This Court held unanimously in *Preseault v. ICC*, 494 U.S. 1 (1990), that section 1247(d) effects a taking of property by permitting such a "rails-to-trails" conversion in contravention of state property law.

A foundational and explicit assumption of the Court's ruling in *Preseault* and of its broader takings jurisprudence is that a taking occurs when, and not until, challenged government action has actually interfered with a property right. A divided panel of the Federal Circuit has now rejected this premise. The court of appeals held that the takings claim here accrued before the railroad easement was converted to a trail easement and therefore before the easement would have reverted to petitioners under the normal operation of state law but for the Trails Act. Thus, under the Federal Circuit's ruling, a takings claim can accrue even before the challenged interference with a property right has occurred.

The Federal Circuit's decision has sweeping ramifications. It conflicts not only with this Court's precedents, but also with the approach of the other

federal court of appeals that has addressed the question and even with other decisions by the Federal Circuit. The rule announced in this case is also flatly inconsistent with basic principles of standing and ripeness: a property owner has heretofore lacked standing to sue for a taking before there has been an interference with a property right. And the ruling may artificially inflate the damages owed by the government because interest on a takings claim runs from the time the claim accrues. The Federal Circuit's departure from established takings and jurisdiction principles is particularly troubling because the Federal Circuit has exclusive jurisdiction over takings claims against the federal government. This Court should grant certiorari to confirm that a takings claim accrues when, and not until, the challenged governmental conduct interferes with a property interest.

* * *

Sixteen years ago today, a recreational trail operator was granted an easement over the Illigs' property pursuant to the Trails Act. There is no dispute that the government took the Illigs' property or that the Takings Clause entitles the Illigs to just compensation for the taking. A divided panel of the Federal Circuit, however, held that the Illigs' claim was untimely under the six-year statute of limitations established by 28 U.S.C. § 2501.

Rail carriers frequently hold only an easement across the land they use for the operation of a rail line. Under the Trails Act and its implementing regulations, if a rail carrier notifies the Surface Transportation Board ("STB" or "Board") of its intent to abandon a rail line, then a state, political subdivision thereof, or private organization may request the opportunity to take control of any right-of-way along the line and operate it as a recreational trail. With the rail carrier's consent, the Board will issue a Notice of Interim Trail Use or Abandonment ("NITU"), which gives the rail carrier and prospective trail operator 180 days to negotiate an agreement for conversion of the railroad right-of-way to a recreational trail. Under Missouri property law, as well as the law of many other states, converting a railroad easement to a non-railroad use constitutes an abandonment of the railroad easement, resulting in its reversion to the owner of the servient estate. *See, e.g.*, *Glosemeyer v. United States*, 45 Fed. Cl. 771, 774, 778-82 (2000) (Missouri law); *Jordan v. Stallings*, 911 S.W.2d 653, 659 (Mo. Ct. App. 1995) (Missouri and other states); *Preseault v. United States*, 100 F.3d 1525, 1543-44 (Fed. Cir. 1996) (*en banc*) (various states).

The Trails Act, however, provides that conversion to trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). The Trails Act thus operates to prevent abandonment under state law and imposes a new

easement upon the land for a recreational trail. In *Preseault v. ICC*, this Court held unanimously that if a railroad easement would be deemed abandoned under the relevant state law when converted to trail use, section 1247(d) effects a taking of private property by blocking the reversion that would otherwise result under state law and thus preventing the servient owner from regaining physical possession of the land unencumbered by the railroad easement.

In *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), *cert. denied*, 546 U.S. 826 (Oct. 3, 2005), and *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 1328 (Feb. 20, 2007), the Federal Circuit held that such a rails-to-trails takings claim accrues (and the applicable six-year limitations period begins to run) when the Board issues the NITU rather than when, but for section 1247(d), the railroad easement would otherwise be deemed abandoned under state law as a result of being converted to trail use. Applying *Caldwell* and *Barclay*, the Federal Circuit dismissed the Illigs' takings claim as untimely.

The rule applied in this case conflicts directly with this Court's decision in *Preseault* and it conflicts with fundamental principles expressed in other decisions by this Court. It also conflicts with decisions by the United States Court of Appeals for the District of Columbia Circuit and with other decisions by the Federal Circuit. The question this case raises is important and recurring. Accordingly, the Federal

Circuit's decision in this case merits this Court's review.

A. THE REGULATORY SCHEME

The STB regulates most railroads in the United States. *See* 49 U.S.C. § 10501. "Concerned about the loss of trackage [as a result of abandonment], Congress included in the Railroad Revitalization and Regulatory Reform Act of 1976 . . . several provisions aimed at promoting the conversion of abandoned lines to [recreational] trails." *Preseault*, 494 U.S. at 5-6. Notably, Congress authorized the Secretary of the Interior to "encourage conversion of abandoned rights-of-way to recreational and conservational uses." *Preseault*, 494 U.S. at 6. Congress' hope was to use the rights-of-way as trails in the interim, so that they could be restored to rail service in the future if necessary.

The original "rails to trails" regime, however, failed to achieve this objective because, "[w]hile the terms of these [railroad] easements and applicable state [property] law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations." *Id.* at 8.[1]

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[1] The Federal Circuit has remarked that, technically, the easement does not "revert" to the owner of the underlying land, but rather, the easement terminates, leaving the underlying fee estate unencumbered by it. *See Preseault*, 100 F.3d at 1533. The term "revert" is technically correct where the rail carrier holds not an easement but a fee simple determinable; in that case,

(Continued on following page)

As subsequent House and Senate Reports put it, "once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use." H.R. Rep. 98-28, at 8-9 (1983), *quoted in Preseault*, 494 U.S. at 8; S. Rep. No. 98-1, at 9 (1983) (same).

In 1983, Congress amended the Trails Act in order to remedy the problem. As amended, section 8(d) of the Act authorizes States, political subdivisions thereof, and qualified private organizations to assume responsibility for a rail carrier's right-of-way in order to put it to "interim use" as a recreational trail. 16 U.S.C. § 1247(d). In order to ensure that the right-of-way would be available later should the Board need to restore service on it, section 1247(d) provides that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." *Id.*

In *Preseault*, this Court held unanimously, "This language [in section 1247(d)] gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests." 494 U.S. at 8. The Court

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"the grantor (or successor) retains only a reversionary interest (known as a 'possibility of reverter')." *National Wildlife Federation v. ICC*, 850 F.2d 694, 703 & n.13 (D.C. Cir. 1988). This petition follows this Court's and the D.C. Circuit's lead by using the helpful metaphor of "reversion" regardless of whether it is technically correct.

explained: "State law generally governs the disposition of reversionary interests .... By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law ...." *Id.* (citations omitted).

A rail carrier wishing to abandon a rail line must apply to the Board for permission. *See* 49 U.S.C. § 10903. Insofar as is relevant here, if the Board approves a rail carrier's request, the Board publishes a notice of exemption in the Federal Register. *Id.* § 1121.4(b).[2] Any "state, political subdivision, or qualified private organization [that] is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking" then has a limited period in which to petition the Board. 49 C.F.R. § 1152.29(a), (b)(2). The carrier then must "indicat[e to the Board] whether and with whom it intends to negotiate [a trail-use] agreement." *Id.* § 1152.29(b)(2).

If the carrier decides not to negotiate with a prospective trail operator, the carrier may proceed to consummate its abandonment of the rail line. *See id.* § 1152.29(e)(1). But if the carrier agrees to negotiate,

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[2] If certain conditions are met, the Board may exempt a rail carrier from the requirements of § 10903. *See* 49 U.S.C. § 10502; 49 C.F.R. § 1152.50. Because this case relates to an exempt carrier, only the procedures pertinent to an exempt carrier are discussed further. *Compare id.* § 1152.29(c) (procedures for "regular" abandonment) *with id.* § 1152.29(d) (procedures for "exempt" abandonment).

the Board will issue a NITU covering the relevant portion of the right-of-way and thereby stay the conditional authorization to abandon that was granted by the Board's notice of exemption. *Id.* § 1152.29(d)(1); *Jost v. Surface Transp. Bd.*, 194 F.3d 79, 82 (D.C. Cir. 1999). Importantly, the issuance of a NITU does not automatically result in interim trail use; conversion is contingent upon the subsequent independent actions of the rail carrier and prospective trail operator: "A . . . NITU provides a 180-day period during which the railroad may . . . negotiate a voluntary agreement for interim trail use with a qualified trail operator. If agreement is reached, interim trail use is thereby authorized. If not, the . . . NITU automatically converts into an effective . . . notice of abandonment." *Preseault*, 494 U.S. at 7 & n.5; *see* 49 C.F.R. § 1152.29(d)(1). If no agreement is reached and the carrier abandons the line instead of converting it to interim trail use, the carrier must "file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line." *Id.* § 1152.29(e)(2); *see also id.* § 1152.50(e).

B. THE ILLIGS' PROPERTY AND THE TRAIL-USE AGREEMENT

In 1872, the Missouri Pacific Railroad Co. ("MoPac")[3] obtained a number of easements on private

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[3] MoPac merged into Union Pacific Railroad Co. in 1997. This petition uses "MoPac" to refer to both entities. *See Illig v. United States* ("*Illig II*"), 67 Fed. Cl. 47, 49 n.2 (2005).

property near St. Louis in order to construct its Carondelet Branch. *Illig v. United States ("Illig I")*, 58 Fed. Cl. 619, 621 (2003). Some easements were obtained by voluntary grant; others, by condemnation. *Id.*

On February 7, 1992, MoPac filed a notice of abandonment of a 6.2-mile stretch of the Carondelet Branch known today as "Grant's Trail." *Id.*; *Illig v. United States ("Illig II")*, 67 Fed. Cl. 47, 49 (2005). The Illigs own parcels of land along Grant's Trail that are servient to railroad easements held by MoPac. *Illig I*, 58 Fed. Cl. at 621.

Gateway Trailnet, Inc. ("Trailnet"), a private trail operator, then petitioned to negotiate a trail-use agreement. *Id.* at 622. The Board issued a NITU on March 25, 1992, effective March 27, 1992, permitting MoPac and Trailnet to negotiate. *Illig II*, 67 Fed. Cl. at 49. The NITU provided that if MoPac and Trailnet failed to reach a trail-use agreement within 180 days, MoPac would be free to abandon its interests in the Carondelet Branch. *Id.* MoPac and Trailnet failed to reach an agreement before the NITU expired on September 23, 1992. The Board then renewed the NITU on October 6, 1992, until November 30, 1992, and then again on December 4, 1992, until December 31, 1992. *Id.*

On December 30, 1992, "MoPac and Trailnet finalized a Trail Use Agreement under which Trailnet assumed all economic and legal responsibility for the

maintenance of the Carondelet Branch as a recreational trail." *Id.* That same day, MoPac issued to Trailnet a quitclaim deed disclaiming all of its interests in the land covered by the trail-use agreement, which was recorded on January 6, 1993. *Id.* at 49-50. Under Missouri law, the easement would have reverted to the Illigs when MoPac abandoned its railroad easement by converting it to trail use on December 30, 1992. *Id.* at 51; App. 42a-47a (Order, Nov. 12, 1999); *see Glosemeyer*, 45 Fed. Cl. at 774, 778-82 (in similar case involving same NITU and trail-use agreement at issue here, finding that, under Missouri law, trail use terminated railroad easement); *see Jordan*, 911 S.W.2d at 659 (Under Missouri law, "an easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment," and upon termination, "the use of the land is again in the [servient owner], free of the burden of the easement.") (quotation marks omitted).

C. JUDICIAL PROCEEDINGS

On December 28, 1998, the Illigs filed this action, seeking just compensation for the taking of their property. *Illig II*, 67 Fed. Cl. at 50. The government moved to dismiss the case as time-barred under the six-year statute of limitations of 28 U.S.C. § 2501. The government maintained that the limitations period began to run on March 25, 1992, when the NITU was first issued. *Id.* The Illigs countered that the limitations period began to run on December 30,

1992, when MoPac converted its railroad easement to interim trail use by entering into the trail-use agreement with Trailnet and executing a quitclaim deed to Trailnet. *Id.* Agreeing with the Illigs that the claim accrued on December 30, 1992, the Court of Federal Claims denied the government's motion. *See id.*; App. 42a-47a (Order, Nov. 12, 1999). The trial court subsequently determined that the government had in fact taken the Illigs' property and therefore owed them just compensation. *See Illig II*, 67 Fed. Cl. at 50; *Illig I*, 58 Fed. Cl. at 621 & n.1; App. 38a-41a (Order, Oct. 22, 2001; Order, Jan. 31, 2002). The Illigs and the government then reached a settlement regarding damages. *Illig II*, 67 Fed. Cl. at 50. The court duly notified the class members of the proposed settlement and, on December 17, 2004, held a fairness hearing. *Id.*

Three days before the fairness hearing, however, the Federal Circuit announced its decision in *Caldwell*. Judge Dyk, joined by Judge Prost, declared, "The taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." *Caldwell*, 391 F.3d at 1233. But Judge Dyk concluded that "this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail-use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)" of the Trails Act, 16 U.S.C. § 1247(d). *Id.*; *see also id.* at 1235 ("the appropriate triggering event for any

takings claim under the Trails Act occurs when the NITU is issued").

In dissent, Judge Newman argued: "Until the right of trail use was vested in the [trail operator] the cause of action had not ripened, and liability of the government for compensation was not fixed." *Id.* at 1236. Filing suit at the NITU stage, therefore, "would have simply been premature; the statute of limitations can not start to accrue before suit could have been filed." *Id.*

In response to *Caldwell*, the government withdrew from the settlement agreement and filed a new motion to dismiss, arguing that the claim was untimely under the new rule announced in *Caldwell*. The Court of Federal Claims found that, under the rule of *Caldwell*, the Illigs' limitations period expired on March 25, 1998, six years after the NITU was first issued. The trial court concluded that *Caldwell* "is controlling and requires that [the court] grant [the government's] renewed motion to dismiss." *Illig II*, 67 Fed. Cl. at 50.

The landowners in *Illig* were not the only ones ensnared by *Caldwell*. The landowners in *Barclay v. United States*, 351 F. Supp. 2d 1169, 1175-76, 1178-80 (D. Kan. 2004), and *Renewal Body Works, Inc. v. United States*, 64 Fed. Cl. 609, 613 (2005), suffered a similar fate. The plaintiffs in those cases appealed to the Federal Circuit before the Illigs, and the Federal Circuit consolidated those appeals and stayed the

Illigs' appeal pending disposition of the *Barclay-Renewal Body Works* appeal. *See* App. 110a-11a.

In *Barclay*, Judge Dyk, again joined by Judge Prost and over Judge Newman's dissent, reaffirmed *Caldwell*. The court declared that a "Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU." 443 F.3d at 1373. The court explained: "Abandonment cannot occur until authorized by federal law, and the NITU precludes abandonment and the reversion that would follow if abandonment were consummated." *Id.* at 1374. Quoting *Caldwell*, the court concluded: "Abandonment is suspended and the reversionary interest is blocked 'when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)' of the Trails Act," *i.e.*, 16 U.S.C. § 1247(d). *Id.* The court insisted that "[i]t . . . makes no difference that railroad use may have continued after the NITU issued." *Id.* at 1374. Summing up, the court stated that it was "adher[ing]" to *Caldwell*'s holding "that takings law supplies a single bright-line rule for accrual," namely, "that the issuance of the original NITU triggers the accrual of the cause of action." *Id.* at 1378.

Pointing to this Court's decision in *Preseault*, Judge Newman observed in dissent: "The NITU is prospective, and requires additional steps by the rail carrier and others before either of the two options authorized by the NITU [*i.e.*, conversion or regular abandonment,] will take legal effect." *Id.* at 1379.

"The issuance of a [NITU] is not a taking," she concluded, because, "[f]or a taking [to occur], 'the alleged harm must be actual or imminent, not conjectural or hypothetical.'" *Id.* at 1380-81 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Responding to Judge Newman, Judge Dyk asserted that although "state law controls the basic [merits] issue of whether trail use is beyond the scope of the right-of-way, . . . [t]his merits question is distinct from the issue of claim accrual" for purposes of the statute of limitations. *Id.* at 1374 n.4.

Following *Barclay* and *Caldwell*, the Federal Circuit subsequently affirmed summarily the trial court's judgment dismissing the Illigs' case as untimely. App. 1a-4a. The Federal Circuit then denied the Illigs' petition for rehearing *en banc*. App. 112a-13a.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Decision Conflicts with Decisions of This Court and Is Erroneous

The Federal Circuit's decisions in *Caldwell* and *Barclay*, and thus its decision in this case, conflict directly with this Court's decision in *Preseault* and with fundamental principles articulated in numerous other decisions by this Court.

A long line of decisions by this Court establishes that a takings claim arises only if there is (1) a government action (2) that interferes (3) with a property right. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Applying this fundamental principle, the Court in *Preseault* held unanimously that the Trails Act effects a taking when it prevents an abandoned railroad easement from reverting under state law to the owner of the servient estate. The Court began: "While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests." *Preseault*, 494 U.S. at 8, 16 & n.9; *id.* at 20 (O'Connor, J., concurring) ("As the Court acknowledges, state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions pursuant to" section 1247(d)) (citation omitted); *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (Property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (quotation marks omitted). Then, noting that section 1247(d) provides that "interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes," the Court concluded: "This language gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them

under easements or similar property interests." *Preseault*, 494 U.S. at 8. The Court explained: "By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law . . . ." *Id.* Later in the opinion, the Court re-emphasized the central role of state law in the rails-to-trails takings analysis: "only some rail-to-trail conversions will amount to takings . . . [because some] easements . . . do not even as a matter of state law revert upon interim use as nature trails." *Id.* at 16.

In her concurring opinion in *Preseault*, Justice O'Connor presented the appropriate takings framework concisely:

> Determining what interest petitioners would have enjoyed under [state] law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim. . . . Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest.

Id. at 21, 24.

In *Barclay* and *Caldwell*, the Federal Circuit established a "single bright-line rule" that a "Trails Act taking begins and a takings claim accrues, if at

all, on issuance of the NITU." *Barclay*, 443 F.3d at 1373, 1378; *Caldwell*, 391 F.3d at 1233, 1235. Indeed, the court insisted that "[i]t . . . makes no difference that railroad use may have continued after the NITU issued." *Barclay*, 443 F.3d at 1374. The Federal Circuit applied that rule to dismiss this case.

The fundamental flaw in the Federal Circuit's quest for a one-size-fits-all "bright-line rule" is that it ignores state property law, which defines the nature and extent of the property interest and which varies from state to state. Consequently, the Federal Circuit's bright-line rule patently conflicts with *Preseault* and *Lingle*.

Under Missouri law, MoPac's interest in its railroad easement would have reverted to the Illigs on December 30, 1992, when MoPac converted the easement to a non-railroad use by entering into the trail-use agreement with Trailnet and executing to Trailnet a quitclaim deed to the easement. *Illig II*, 67 Fed. Cl. at 51; App. 42a-47a (Order, Nov. 12, 1999); *see Glosemeyer*, 45 Fed. Cl. at 774, 778-82 (in similar case involving same NITU and trail-use agreement at issue here, finding that, under Missouri law, trail use terminated railroad easement); *Jordan*, 911 S.W.2d at 659. Because section 1247(d) operated to prevent the reversion that would otherwise have resulted under state law upon conversion of MoPac's railroad easement to interim trail use, section 1247(d) effected a taking of the Illigs' property rights. That takings claim could not have accrued before the date on which section 1247(d) prevented MoPac's abandonment of

the railroad easement and its reversion to the Illigs – December 30, 1992. The NITU, therefore, could not have given rise to the Illigs' takings claim at the time it was issued, and the majority below erred in holding otherwise. *See United States v. Clarke*, 445 U.S. 253, 258 (1980) ("When a taking occurs by physical invasion [rather than by formal condemnation proceeding], . . . the usual rule is that the time of the invasion constitutes the act of taking").

Apparently recognizing the basic flaw in its decision, the *Barclay* majority asserted, in a footnote, that although "state law controls the basic [merits] issue of whether trail use is beyond the scope of the right-of-way, . . . [t]his merits question is distinct from the issue of claim accrual" for purposes of the limitations period under section 2501. *Barclay*, 443 F.3d at 1374 n.4. The court cited no authority for the distinction between merits and claim accrual, and we have found none. Indeed, in a breach-of-contract case against the government, this Court suggested that such a distinction is untenable. *See Franconia Assocs. v. United States*, 536 U.S. 129, 147 n.10 (2002) ("our ruling today" – that under § 2501, a claim for breach of contract accrues at the time the government actually fails to perform its contractual obligation, not at the time the government anticipatorily repudiates its obligation – "ensures that suit must be brought within a fixed period after the date of *injury*" (emphasis added)).

The doctrines of standing and ripeness further illuminate the error in the Federal Circuit's analysis

and specifically its specious distinction between merits and claim accrual. In this case, as in other rails-to-trails cases, the Act's interference with the landowner's right of reversion was, at the time the NITU was issued, highly contingent: (1) there could be no interference unless and until, under state law, the easement would have been abandoned and the property would have reverted to the servient landowner but for operation of the Trails Act; (2) no new easement for a recreational trail would be created unless and until the rail carrier and trail operator reached a trail-use agreement and the rail carrier transferred its interest to the trail operator; and (3) the issuance of the NITU, standing alone, did not require the rail carrier to enter into a trail-use agreement or otherwise convert the easement to interim trail use – after all, negotiations could fail, in which case the easement would be abandoned and actually revert to the servient landowner notwithstanding the issuance of the NITU.

Thus, at the time the NITU was issued, before the rail carrier had abandoned the easement for purposes of state law by converting it to interim trail use, the NITU caused the Illigs nothing more than a hypothetical possible future injury: The prospect that MoPac would enter into a trail-use agreement and that section 1247(d) would then preempt abandonment under state law and encumber the land with a new non-railroad easement. And when the NITU was issued, these were uncertain prospects. As the STB has recognized, the reversion of the servient owner's

property is blocked at the time of the conversion to trail use pursuant to a trail-use agreement. *See* App. 157a (STB FY 2002-2004 Report) ("if a trail arrangement is reached, the right-of-way remains under the jurisdiction of the STB during the interim trail use, and reversionary property interests in the right-of-way cannot vest"). Accordingly, the Illigs (and landowners like them) lack standing to bring their takings claim at the time the NITU is issued. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (To have standing under Article III, plaintiff "must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.") (quotation marks and citations omitted).

Similarly, the Illigs' takings claim – that section 1247(d) prevented reversion to them of the railroad easement under state law upon its conversion to trail use – was not ripe at the time the NITU was issued because the interference was contingent upon the rail carrier and trail operator reaching an agreement to convert the easement, which might not have happened. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (quotation marks omitted). The Federal Circuit's blanket rule that the Illigs' claim and all other rails-to-trails takings claims accrue (if at all) at the time the NITU is issued is therefore clearly inconsistent with this

Court's established approach to standing and ripeness.

In the face of these fundamental problems, the Federal Circuit defended its bright-line rule on several grounds, none of which comports with *Preseault* or with principles well-established by this Court.

1. The Federal Circuit majority stated that "'the issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way.'" *Barclay*, 443 F.3d at 1373 (quoting *Caldwell*, 391 F.3d at 1233-34). As the Federal Circuit saw it, "[i]f the railroad and the trail operator reach an agreement, 'the NITU extends indefinitely to permit interim trail use.'" *Id.* at 1371 (quoting *Caldwell*, 391 F.3d at 1230).

The Federal Circuit has misunderstood the Trails Act scheme – the NITU itself does not preempt state law abandonment of the railroad easement that occurs when the easement is converted to interim trail use, nor does it prevent the resulting reversion that would occur under state law. At most, the issuance of the NITU delays for 180 days (plus extensions) a non-rails-to-trails abandonment that might otherwise occur so that the carrier and prospective trail operator have an opportunity to negotiate a possible trail-use agreement. *See* 49 C.F.R. § 1152.29(d). Only if such a trail-use agreement is entered is the railroad easement converted to interim trail use. And only at

that point does section 1247(d) effect a taking by preventing the abandonment and reversion that would otherwise result under state law.

Even if the Federal Circuit were correct that the NITU is the only government act involved in preventing the reversion of the servient owner's property interests upon the conversion to interim trail use, the court's rule would still conflict with *Preseault* and *Lingle*. As discussed above, those decisions and others make clear that a government act is necessary but not always sufficient to effect a taking; there must also be a resulting interference with a property right. *See also Preseault*, 494 U.S. at 24-25 (O'Connor, J., concurring) ("Of course, a party may gain the benefit of these [takings] principles only after establishing possession of a property interest that has been burdened."); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (unanimous) ("[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."); *cf. Franconia Assocs.*, 536 U.S. at 134, 139-46 (under § 2501, claim for breach of contract accrues at time government actually fails to perform contractual obligation, not at time government anticipatorily repudiates its obligation). Under the Federal Circuit's rule, however, it is irrelevant whether the railroad

easement would have been abandoned at the time of the NITU.

The rule of *Preseault* and *Lingle* has no less force merely because the interference is contingent upon certain voluntary acts of private parties subsequent to the government act – namely, the rail carrier and trail operator agreeing to convert the railroad easement to interim trail use. In effect, Congress, through the Trails Act, delegated its power of eminent domain to the rail carrier and trail operator. Indeed, in *Preseault*, this Court noted that the Trails Act does not give the STB the "power to condemn railroad rights-of-way for interim trail use" or to "set up trails on its own," but rather vests that power in the rail carrier and trail operator. *See* 494 U.S. at 15 n.8, 16 n.10. The issuance of the NITU, this Court explained, is just the "begin[ning]" of the "conversion process"; it is the conversion to interim trail use that effects the taking. *Id.* at 16 n.10. This Court has previously made clear that where the government authorizes (but does not mandate) a private actor to interfere with another's property rights, the taking occurs not when that authority is granted but when the private actor exercises it. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423, 438 (1982) ("Teleprompter's cable installation on appellant's building [pursuant to state authorization] constitutes a taking . . . ."); *cf. Franconia Assocs.*, 536 U.S. at 143-46 (under § 2501, claim for breach of contract accrues when promisee elects to treat government's anticipatory repudiation as breach rather than when government repudiates).

2. Although the Federal Circuit acknowledged that "state law generally creates the property interest in a railroad right-of-way," it insisted that "[f]ederal law dictates when abandonment occurs." *Barclay*, 443 F.3d at 1374. That assertion is true insofar as it relates to the federal rails-to-trails regulatory regime. *See, e.g.*, 16 U.S.C. § 1247(d) (interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes"). But, as Justice O'Connor put it in her concurrence in *Preseault*, that "view conflates the scope of the [Board's] power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution." 494 U.S. at 23. Indeed, this Court held in *Preseault* that section 1247(d) causes a taking precisely because it defines – or more precisely, redefines – "abandonment" contrary to state law. 494 U.S. at 8 ("By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law . . . .") (citation omitted); *id.* at 22 (O'Connor, J., concurring) ("Although the [Board's] actions may preempt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. . . . Any other conclusion would convert the [Board's] power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.").

3. The Federal Circuit also reasoned that the taking occurs at the time the NITU is issued because it "precludes abandonment and the reversion that would follow if abandonment were consummated." *Barclay*, 443 F.3d at 1374. The Federal Circuit explained that "even if under [state] law the reversion would not occur until after federal authorization of abandonment, that state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU." *Barclay*, 443 F.3d at 1374. The fallacy in this universal proposition is patent: again, if under state law there would not have been an abandonment caused by the rail carrier's conversion of the easement to trail use by the time of the NITU, the mere issuance of the NITU cannot delay or otherwise interfere at that time with the reversion that would result from such conversion.

Moreover, even if the issuance of the NITU, standing alone, interfered with a state-law property right, that interference would not give rise to the takings claim asserted by the Illigs here. The issuance of the NITU merely establishes a 180-day period during which the carrier and prospective trail operator may negotiate a conversion of the railroad easement to a trail easement. If the easement would otherwise have been abandoned (by means other than conversion to interim trail use) before or during that period, the NITU might effect a taking for the duration of the negotiations. But that taking would be fundamentally different from the one for which the Illigs are seeking compensation in this case. First,

that taking (if it was a taking at all) would not be for the taking of an easement for recreational trail use, which could not occur until the conversion pursuant to the trail-use agreement and the operation of section 1247(d). Second, that taking would be a temporary taking, which is "best analyzed within the *Penn Central* [multi-factor] framework." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 336, 342 (2002) (temporary development moratorium). In contrast, the taking that occurred when the reversion of the easement that would have resulted under state law from its conversion to trail use was blocked under section 1247(d) was a permanent physical occupation and therefore a *per se* taking. *See Lingle*, 544 U.S. at 537-38, 546 ("appropriat[ing an] easement . . . [is] a *per se* physical taking"); *Loretto*, 458 U.S. at 430 (A "right-of-way 'cannot be appropriated in whole or in part except upon the payment of compensation.'").

The Federal Circuit mentioned the possibility that the issuance of a NITU might effect a temporary taking, but it thought there was no difference for purposes of claim accrual between such a temporary taking and the subsequent *per se* permanent physical taking that results under section 1247(d) if and when the rail carrier converts the easement to interim trail use. To the Federal Circuit, the dispositive fact was that

> the NITU operates as a single trigger to several possible outcomes. It may, as in this

> case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and . . . a temporary taking may have occurred.

Caldwell, 391 F.3d at 1230, 1234-35.

This analysis rests on the important assumption that the limitations period for a temporary takings claim begins to run at the time the temporary interference begins. But under the *Penn Central* test, it may be impossible for the property owner to determine whether and when his property has been taken because this Court has not identified a "set formula to determine where regulation ends and taking begins, [and has] engag[ed] in essentially ad hoc, factual inquiries," *Macdonald v. County of Yolo*, 477 U.S. 340, 348-49 (1986), and because "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." *Tahoe-Sierra*, 535 U.S. at 337, 341-42; *id.* at 338 n.34 (suggesting six-year development moratorium would not necessarily effect a taking).

Although this Court has never squarely addressed the question of when the limitations period for a temporary takings claim begins to run, its unanimous decision in *United States v. Dickinson*, 331 U.S. 745 (1947), strongly suggests that the Federal Circuit's approach is incorrect in a case such as this. In *Dickinson*, the government had gradually flooded the plaintiff's land. *Id.* at 746-47. The Court

rejected the government's contention that the limitations period began to run when the plaintiff's "property . . . was partially submerged for the first time." *Id.* at 747. The Court noted that the Takings Clause "expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' – when they are born, whether they proliferate, and when they die." *Id.* at 748. In view of this principle, the Court reasoned:

> If suit must be brought, lest [the plaintiff] jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him – for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim – the overflow due to rises in the level of the river – is not a single event; it is continuous. [T]here is nothing . . . to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

Id. at 749; *see also Macdonald*, 477 U.S. at 350 n.7 ("A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures

in order to obtain [a] determination" of whether a regulation has "gone too far").[4]

Under *Dickinson*, the Illigs' takings claim would be timely even if their *per se* physical takings claim accrued simultaneously with their putative temporary takings claim accrued. Any temporary interference that may have resulted from the NITU's imposition of a negotiation period stabilized no earlier than when MoPac and Trailnet entered into the trail-use agreement on December 30, 1992.

II. The Decision Below Creates a Conflict Both Within the Federal Circuit and Among the Courts of Appeals

As discussed above, in *Caldwell*, *Barclay*, and this case the Federal Circuit ruled that a rails-to-trails takings claim accrues, if at all, at the time the

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[4] A fundamentally different situation is presented by a case in which a permanent taking is initiated and then abandoned, thereby becoming a temporary taking. Where that is the sequence, the problems discussed above may not exist – it may be determinable *ab initio* that the interference might go "too far," and so the claim may accrue at the time of the initial, ostensibly permanent interference, with the subsequent abandonment merely altering the measure of damages. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317-21 (1987); *United States v. Dow*, 357 U.S. 17, 26 (1958). The Federal Circuit therefore mistakenly analogized this case to such a situation. *See Caldwell*, 391 F.3d at 1234 & n.8 (citing decisions). Here, the first interference was to be temporary at the outset and, as the Federal Circuit understood it, only later transformed into a permanent interference.

NITU is issued, even though the easement may not yet have been abandoned under state law as a result of its conversion to interim trail use under section 1247(d). That rule conflicts directly with statements by the D.C. Circuit. In *National Association of Reversionary Property Owners v. STB*, an association of reversionary landowners challenged the Board's denial of its request for a rule that would "require actual notice of interim trail use proposals to each owner of land along a line proposed for abandonment." 158 F.3d 135, 141 (D.C. Cir. 1998). The court held that the association's petition was untimely, *id.* at 141-46, but in the course of describing the regulatory regime, the court made clear that a taking occurs when a trail-use agreement is entered and reversion of the easement under state law is, accordingly, prevented by section 1247(d):

> *But for the negotiation of a trail use agreement*, state property law would be revived and, possibly, trigger the extinguishment of rights-of-way and the vesting of reversionary interests. When such a reversion is blocked, the interim trail use has been deemed a taking. . . .

Id. at 139 (citing *Preseault*, 494 U.S. at 4-5, and *Preseault*, 100 F.3d at 1550, 1552) (emphasis added); *see also National Wildlife Fed'n v. ICC*, 850 F.2d 694, 703 (D.C. Cir. 1988).

The Federal Circuit's rule also conflicts with several of its earlier decisions, in which it said that a rails-to-trails taking occurs at the time of the conversion to interim trail use (pursuant to the trail-use

agreement), not at the time the NITU is issued.[5] For example, a plurality of the *en banc* Federal Circuit in *Preseault* (which followed on this Court's decision in *Preseault*) stated that "the taking . . . resulted from the *establishment of the recreational trail*" and that "the *occupation* of the Preseaults' property by the City of Burlington under the authority of the Federal Government constituted a taking of their property for which the Constitution requires that just compensation be paid." 100 F.3d at 1531, 1552 (emphasis added); *see also id.* at 1550 ("[t]he taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking"); *see also Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) ("On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases."); *Toews v. United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004) ("As a result of the imposition of the recreational trail and linear park, the easement for railroad purposes was converted into a new and different easement" and thus a taking occurred.).

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[5] Although an intracircuit split may not ordinarily merit review, the Federal Circuit's decisions relating to takings are uniquely important because, under the Tucker Act, the Federal Circuit has exclusive appellate jurisdiction over takings claims against the federal government.

Further, the Federal Circuit's notion that a takings claim could accrue before the challenged government act had actually interfered with a property interest (and before it was clear to the landowner that the challenged government act would actually interfere with a property interest) conflicts with that court's many decisions holding that "a takings claim accrues when all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (quotation marks omitted).

Finally, as noted earlier, the Federal Circuit's ruling assumes that when a temporary taking develops into a permanent physical occupation, the *per se* permanent physical takings claim accrues at the moment the interference is first imposed temporarily. That assumption conflicts with *Boling*, in which the Federal Circuit held that when a permanent taking is effected through a gradual interference, as in *Dickinson*, the claim accrues only "when it becomes clear that the gradual process set into motion by the government has effected a permanent taking." 220 F.3d at 1370-73. And it conflicts with the Federal Circuit's decision in *Creppel v. United States*, in which it held that a temporary takings claim accrued at the moment the temporary interference *ended*. 41 F.3d 627, 632 (Fed. Cir. 1994).

III. This Case Presents Important, Recurring Constitutional and Federal Jurisdictional Issues

The Federal Circuit's bright-line rule that a rails-to-trails takings claim accrues, if at all, at the time the NITU is issued raises important and recurring constitutional and jurisdictional issues. As explained above, landowners like the Illigs lack standing and a ripe rails-to-trails takings claim at the time the NITU is issued; they do not suffer an actual injury from operation of section 1247(d) until it interferes with the abandonment and reversion that would otherwise occur under state law. Consequently, the court's rule discards long-established rules of Article III standing and ripeness by permitting a landowner to sue before there has been an actual injury from the challenged government action. Indeed, because the Board has the power to renew or extend a NITU indefinitely, the landowner may be *required* to bring suit while an actual injury is still hyphothetical in order to avoid having his claim be deemed time-barred. *See* App. 129a-42a (STB, Wisconsin Central Ltd., Decision and Notice of Interim Trail Use or Abandonment, No. AB-303 (Sub-No. 18X) (NITU issued in 1998 and extended into 2009)).

The Federal Circuit's erroneous rule also has important practical consequences. Ordinarily, the property taken is valued at the time of the taking. *United States v. Dow*, 357 U.S. 17, 22 (1958). The Federal Circuit's decision introduces doubt as to whether the property should be valued as of the date

of the NITU rather than as of the date of the conversion and interference with the resulting abandonment. *See* App. 126a-28a (Tr. of Proceedings, *Illig v. United States*, No. 98-934 (Fed. Cl. June 17, 2005) ("if we construe [*Caldwell*] in the way the government suggests, [it] not only throws the limitations[ ] issue into a cockeyed hat, but it throws damages into a cockeyed hat as well") (Bruggink, J.)). And because interest against the government accrues from the date of the taking, *see Dow*, 357 U.S. at 22, the earlier the date of the taking, the more interest will accrue. In addition, the government, landowners, and the courts may incur unnecessary litigation costs as some landowners file suit upon issuance of a NITU, even though the permanent *per se* taking may never actually occur (if the rail carrier and trail operator fail to reach an agreement). This Court has previously rejected an interpretation of section 2501 in part because it would have had similar consequences. *See Franconia Assocs.*, 536 U.S. at 146 ("Putting prospective plaintiffs to the choice of either bringing suit soon after the Government's repudiation [of the contract] or forever relinquishing their claims [for breach of contract] would surely proliferate litigation.").

Many cases will be affected by the Federal Circuit's decision. Each year, the Board issues dozens of NITUs affecting hundreds of miles of trackage. *See* App. 143a-50a (STB FY 1998-2001 Report); App. 151a-59a (STB FY 2002-2004 Report). As in this case, where there are nearly 100 class members, a rails-to-trails

conversion often affects tens, hundreds, or even thousands of landowners. *See, e.g.*, *Moore v. United States*, 41 Fed. Cl. 394 (1998) (2,000 class members); *Hash v. United States*, No. 99-324, 2000 U.S. Dist. LEXIS 20061, at *16 (Fed. Cl. July 7, 2000) (over 200 class members); *Schmitt v. United States*, 203 F.R.D. 387, 401 (S.D. Ind. 2001) (100-200 class members). The Federal Circuit's decisions in *Caldwell*, *Barclay*, and this case will affect every one of those landowners (provided, of course, that the railroad easement encumbering their land would be deemed abandoned under state law upon conversion to interim trail use). And the impact of the Federal Circuit's decisions is not limited to the context of a rails-to-trails takings claim. Rather, those decisions could affect nearly every takings claim against the federal government.

CONCLUSION

For the foregoing reasons, this petition for a writ for certiorari should be granted.

December 30, 2008

Respectfully submitted,

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**SARAH ILLIG and GALE ILLIG,
(for themselves and as representatives
of a class of similarly situated persons)
Plaintiffs-Appellants, v.
UNITED STATES, Defendant-Appellee.**

2005-5156

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

274 Fed. Appx. 883; 2008 U.S. App. LEXIS 10497

**April 7, 2008, Decided
April 7, 2008, Filed**

COUNSEL: For Gale Illig, Plaintiff-Appellant: HEARNE, II, MARK F., PRINCIPAL ATTORNEY, Lathrop & Gage, LC, St. Louis, MO; COOPER, CHARLES J., OF COUNSEL ATTORNEY, Cooper & Kirk, PLLC, Washington, DC; SEARS, J. ROBERT, OF COUNSEL ATTORNEY, Lathrop & Gage, LC, St. Louis, MO; AHUJA, ALOK, OF COUNSEL ATTORNEY, Lathrop & Gage, LC, Kansas City, MO; LARGENT, MEGHAN S., OF COUNSEL ATTORNEY, Lathrop & Gage, LC, St. Louis, MO.

For Sarah Illig (for themselves and as representatives of a class of, Plaintiff-Appellant: HEARNE, II, MARK F., PRINCIPAL ATTORNEY, Lathrop & Gage, LC, St. Louis, MO; COOPER, CHARLES J., OF COUNSEL ATTORNEY, Cooper & Kirk, PLLC, Washington, DC; SEARS, J. ROBERT, OF COUNSEL ATTORNEY, Lathrop & Gage, LC, St. Louis, MO; AHUJA, ALOK, OF COUNSEL ATTORNEY, Lathrop & Gage, LC, Kansas City, MO; LARGENT, MEGHAN S., OF

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For United States, Defendant-Appellee: KOVACS, KATHRYN E., PRINCIPAL ATTORNEY, Department of Justice, Washington, DC; TARDIFF, KRISTINE S., OF COUNSEL ATTORNEY, Department of Justice, Concord, NH; SMELTZER, JOHN L., OF COUNSEL ATTORNEY, Department of Justice, Washington, DC; PERSON, STACEY J. WILLEMSON, OF COUNSEL ATTORNEY, Department of Justice, Washington, DC.

JUDGES: Before MAYER, LINN, and DYK, Circuit Judges.

OPINION BY: Timothy B. Dyk

OPINION

ON MOTION

DYK, *Circuit Judge.*

ORDER

The United States moves to summarily affirm the United States Court of Federal Claims' judgment in *Illig v. United States*, 67 Fed. Cl. 47 (2005). Sarah and Gale Illig respond and do not oppose the motion.

Sarah and Gale Illig own land located along a railroad line. On December 28, 1998, they filed a complaint at the Court of Federal Claims, alleging that the conversion of the railroad line into a recreational trail constituted a taking of their interest in a

right-of-way requiring just compensation under the Fifth Amendment. The Court of Federal Claims dismissed the complaint as time-barred by the six-year statute of limitations under the Tucker Act. 28 U.S.C. § 2501. Citing our decision in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), the court determined that the petitioners' complaint began to accrue on March 25, 1992, the date that the Interstate Commerce Commission issued its Notice of Interim Trail Use, and that the complaint was not brought within six years of that date.

Sarah and Gale Illig filed an appeal seeking review by this court. We stayed proceedings in this case pending disposition of other cases with similar issues. The United States now moves to summarily affirm the Court of Federal Claims' judgment. Summary affirmance of a case "is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). In the present case, it is clear that summary affirmance is warranted.

The Court of Federal Claims correctly determined that the petitioners' complaint was time-barred. We held in *Caldwell* and reaffirmed in *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006) that the issuance of the original NITU triggers the accrual of the cause of action under the Tucker Act. *Caldwell*, 391 F.3d at 1235. Here, as the court determined, the petitioners' complaint began to

accrue on March 25, 1992. Because the petitioners did not bring their complaint within six years of that date, the Court of Federal Claims correctly determined that it lacked jurisdiction and was required to dismiss the complaint. *See John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 757, 169 L. Ed. 2d 591 (2008) (affirming this court's determination that the six-year statute of limitations is jurisdictional and cannot be waived).

We note that the appellants agree that the judgment of the Court of Federal Claims must be affirmed, although they state that they may request rehearing en banc to challenge our holdings in *Caldwell* and *Barclay*.

Accordingly,

IT IS ORDERED THAT:

(1) The motion to summarily affirm is granted.

(2) All sides shall bear their own costs.

APR 07 2008

Date

/s/ Timothy B. Dyk
Timothy B. Dyk
Circuit Judge

SARAH ILLIG and GALE ILLIG, for themselves, and as representatives of a class of similarly represented persons, Plaintiffs, v. THE UNITED STATES, Defendant.

No. 98-934L

UNITED STATES COURT OF FEDERAL CLAIMS

67 Fed. Cl. 47; 2005 U.S. Claims LEXIS 219

July 27, 2005, Filed

COUNSEL: Mark F. Hearne, II and J. Robert Sears, Lathrop & Gage LC, St. Louis, Missouri, for plaintiffs.

Kristine S. Tardiff, Environment and Natural Resources Division, United States Department of Justice, for defendant. With her on the initial brief were Thomas L. Sansonetti, Assistant Attorney General, Evelyn Kitay, Office of General Counsel, Surface Transportation Board, of counsel. With her on the supplemental briefs was Kelly A. Johnson, Acting Assistant Attorney General.

JUDGES: ERIC G. BRUGGINK, Judge.

OPINION BY: ERIC G. BRUGGINK

OPINION

Bruggink, *Judge*.

This takings class action is before the court on defendant's renewed motion to dismiss plaintiffs' claims for lack of jurisdiction pursuant to RCFC 12(b)(1). Defendant argues that plaintiffs' claims are time-barred by the applicable six-year statute of limitations. *See* 28 U.S.C. § 2501 (2000). This precise issue presented itself earlier in this litigation. At that time, we denied defendant's motion to dismiss finding that the claims, filed on December 28, 1998, were timely. We held that plaintiffs' claims based on the National Trail Systems Act (Trails Act), 16 U.S.C. § 1247(d) (2000), accrued on December 30, 1992, upon execution of a Trail Use Agreement. *Illig v. United States*, No. 98-934L (Fed. Cl. Nov. 12, 1999). We concluded that any action taken before this date pursuant to the Trails Act had no permanent legal effect on plaintiffs' property rights and therefore rejected defendant's argument that plaintiffs' claim accrued on March 25, 1992, when the Interstate Commerce Commission (ICC) issued a Notice of Interim Trail Use (NITU). *Id.*

The case proceeded for four years through extensive discovery, motion practice and a finding of liability,[1] to a Rule 23(e) settlement hearing, at which this court planned to present to class members the

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[1] *Illig v. United States*, No. 98-934L (Fed. Cl. Oct. 22, 2001) (order granting partial summary judgment to named plaintiffs).

opportunity to object to a proposed settlement. Immediately prior to the hearing, however, the Federal Circuit announced its decision in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), *reh'g en banc denied* (Mar. 23, 2005). The majority there held that "the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is issued." *Id.* at 1235. Although much time and effort has been expended in this case, we are compelled by the jurisdictional nature of the issue to put regular proceedings on hold while we address defendant's refiled motion to dismiss based on this recent change in law. After careful review of the written submissions of the parties and consideration of the oral arguments, we are compelled to grant defendant's renewed motion.

BACKGROUND

Factual Background

Plaintiffs are owners of various parcels of land located along a 6.2-mile segment of the former Carondelet Branch of the Missouri Pacific Railroad (MoPac) in southern St. Louis County, Missouri. For several years, plaintiffs' land was burdened by a right-of-way held by MoPac for railroad purposes.

On February 7, 1992, MoPac filed a Notice of Exempt Abandonment with the ICC seeking authorization to abandon railroad service over the 6.2-mile segment of the Carondelet Branch between milepost 15.8 and milepost 22.0. At the request of Gateway

Trailnet, Inc. (Trailnet), a private trail operator, and pursuant to 49 C.F.R. § 1152.29 (1998), the ICC issued a NITU on March 25, 1992, with an effective date of March 27, 1992. The NITU provided that MoPac could negotiate with Trailnet to convert the Carondelet Branch into a trail suitable for recreational purposes. Pursuant to the NITU, if MoPac's negotiations were unsuccessful, and if it failed to enter into an agreement within 180 days, MoPac would be free to abandon its interests in the Carondelet Branch.

MoPac began negotiations with Trailnet, but was unable to reach an agreement before the 180-day period expired on September 23, 1992. On October 6, 1992, the ICC issued a 60-day extension of the negotiating period, which effectively renewed the NITU until November 30, 1992. Still without agreement by the new expiration date, on December 4, 1992, the ICC again renewed the NITU until December 31, 1992.

On December 30, 1992, MoPac and Trailnet finalized a Trail Use Agreement under which Trailnet assumed all economic and legal responsibility for the maintenance of the Carondelet Branch as a recreational trail. MoPac retained the right to petition for the restoration of all or part of the railroad right-of-way for the purpose of future reactivation of rail service. Following the agreement, MoPac executed a quitclaim deed transferring to Trailnet all of MoPac's interests in the land comprising the Carondelet

Branch. The deed was recorded with the St. Louis County Recorder of Deeds on January 6, 1993.

In 1997, MoPac[2] requested that the ICC[3] reopen the proceeding and partially vacate the NITU. MoPac indicated that continued railroad operations were necessary over a portion of the covered railroad line in order to adequately serve a shipper located at the end of the corridor, milepost 22.0. Trailnet agreed to reconvey to MoPac the portion of the corridor needed for railroad operations. On April 18, 1997, the ICC issued a decision to reopen the proceeding and vacate the original NITU solely with respect to the segment between milepost 21.79 and milepost 22.0.

Procedural History

Plaintiffs filed their complaint on December 28, 1998, alleging that the conversion of the Carondelet Branch into a recreational trail constituted a taking of their interest in the right-of-way requiring just compensation under the Fifth Amendment. Arguing that the taking occurred upon issuance of the NITU on March 25, 1992, defendant moved to dismiss plaintiffs' claims on the grounds that the complaint was time-barred by the applicable six-year statute of

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[2] MoPac merged into Union Pacific Railroad Company on January 1, 1997. We use "MoPac" to refer to both entities.

[3] The Surface Transportation Board succeeded the ICC on January 1, 1996. 49 U.S.C. § 702 (2000). For consistency purposes, we use "ICC" to refer to both agencies.

limitations. Plaintiffs argued that their claim was timely because the taking occurred when MoPac entered into the Trail Use Agreement and executed a quitclaim deed to Trailnet on December 30, 1992. In an unpublished opinion issued on November 12, 1999, we held that the claim accrued on December 30, 1992, and denied defendant's motion to dismiss.

We proceeded to find in favor of plaintiffs regarding liability. The parties then initiated settlement discussions. Lead plaintiffs and the United States reached a proposed settlement. Pursuant to RCFC 23(e), we directed notice to the class members giving them an opportunity to object to the terms of the proposed settlement, exceeding $5.1 million. Only four of the eighty-eight eligible class members filed written objections. A fairness hearing was held on December 17, 2004, in St. Louis, Missouri.

DISCUSSION

The complaint was filed on December 28, 1998. The original NITU was issued on March 25, 1992. If the holding in *Caldwell* controls the present facts, the case was filed out of time. If it does not apply, the complaint was timely by two days.

Plaintiffs attempt to distinguish *Caldwell*. They assert that the decision hinged on peculiarities of Georgia law. They contend that the decision suggests that the railroad there had abandoned the easement prior to the issuance of the NITU, thereby entitling the plaintiff to the unencumbered fee before the

decided date of taking. Defendant claims the accrual rule announced in *Caldwell* operates as a bright-line rule for all takings claims arising under the Trails Act, irrespective of underlying state law or whether the plaintiff gained unencumbered access before the NITU was issued. We find defendant's interpretation correct. For reasons set out below, *Caldwell* is controlling and requires that we grant defendant's renewed motion to dismiss.

The Caldwell Decision

In *Caldwell,* the plaintiffs owned land in Georgia burdened by a railroad easement. After the railroad company filed a request for exemption and the city of Columbus, Georgia filed a railbanking petition, the ICC issued a NITU on August 31, 1994, covering 7.4 miles of corridor. At the request of both parties, the NITU was expanded on June 2, 1995 to cover a total of 10.6 miles. After extension of the NITU negotiating period, the parties reached an agreement. The city informed the ICC of this agreement on July 5, 1996. The railroad company transferred its easement through a quitclaim deed on October 9, 1996. The deed was recorded on October 11, 1996.

The *Caldwell* plaintiffs filed their complaint on October 7, 2002, alleging that the conversion of the railroad right-of-way to trail use constituted a taking. Relying in part on the decision in this case dated November 12, 1999, this court held that the taking accrued on July 5, 1996, when the parties signed the

Trail Use agreement. It therefore dismissed the claims as time-barred. *Caldwell v. United States,* 57 Fed. Cl. 193, 203 (2003). Plaintiffs appealed. Addressing for the first time the issue of when a rails-to-trails takings claim accrues, the Federal Circuit framed the issue as one involving the determination of when "state law reversion interests [were] forestalled by operation of section 8(d) of the Trails Act." *Caldwell,* 391 F.3d at 1233. Finding that the issuance of the NITU is the "only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way," *id.* at 1233-34, the court held that the NITU is the "finite start" to either temporary *or* permanent takings claims. *Id.* at 1235. Because both the original NITU issuance and the later NITU expansion occurred more than six years before plaintiffs filed their complaint, the court dismissed the claim as time-barred.

A. *The Parties' Interpretations of Caldwell*

Plaintiffs believe the outcome in *Caldwell* turned on Georgia law. Although nothing in the opinion directly indicates a reliance on Georgia law with respect to abandonment, plaintiffs suggest that implicit in the Federal Circuit's holding that "the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is issued," is a determination that under Georgia law, the plaintiffs held a possessory interest in unencumbered fee title prior to the issuance of the NITU. Had this not

been the case, plaintiffs claim, the NITU would not have triggered the accrual of a claim. Under Missouri law, on the other hand, plaintiffs' land was still burdened by the railroad easement when the NITU was issued. *See Glosemeyer v. United States,* 45 Fed. Cl. 771 (2000) (related case finding that MoPac did not abandon its easement until it conveyed its interest to Trailnet on December 30, 1992). Because plaintiffs lacked any present possessory interest at the time of the NITU, plaintiffs claim that *Caldwell* is thus distinguishable and we need not apply its holding to this case.

At oral argument, plaintiffs also suggested another interpretation of *Caldwell,* which similarly assumes an implicit reliance on Georgia law. Plaintiffs point to language in *Caldwell* explaining that a rails-to-trails takings claim accrues only when a specific set of circumstances arise: "We hold that the Fifth Amendment taking, if any, under the Trails Act is accomplished when an NITU is issued *and* state law reversionary[4] interests that would otherwise take effect pursuant to normal abandonment proceedings are forestalled." 391 F.3d at 1236 (emphasis added). Placing emphasis on the conjunction, plaintiffs point out that a takings claim requires 1) a NITU to be issued, *and* 2) forestallment of state law property rights. Plaintiffs conclude that this means the taking cannot occur until the right to full possession would

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[4] *See infra* note 5.

accrue under state law. Plaintiffs point for support to *Hash v. United States,* 403 F.3d 1308 (Fed. Cir. 2005), where the Federal Circuit recently stated: "In *Preseault v. ICC,* the Court held that if abandonment of railway use and application of the Trails Act effects a taking *when the easement would otherwise revert to the owner of the servient estate,* the landowner may sue for compensation under the Tucker Act." *Hash,* 403 F.3d at 1312 (emphasis added) (citations omitted).[5]

Plaintiffs allege that in *Caldwell,* the landowner's right to full use of the fee arose before the ICC issued the NITU. When the NITU was issued, the right to use of the surface was blocked, thus satisfying both requirements of the *Caldwell* formulation. Plaintiffs allege that here, by contrast, their own

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[5] Presumably, the court uses the concept of "reverter" of the easement as shorthand for extinction of the easement and the removal of the encumbrance to full use of the surface by the fee owner. When the right of way is abandoned, no estate in land reverts. The Federal Circuit explained the use of this terminology in *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996). The court stated: "Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interests following the creation of an easement as a 'reversion' in fee. . . . Under either characterization the result upon termination of the easement is the same." *Id.* at 1533-34. In any event, the court in *Hash* did not, however, specifically address the issue of claim accrual. Nor did the Court in *Preseault v. ICC,* 494 U.S. 1, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990), which established liability on behalf of the Government for takings in Rails-to-Trails cases without reaching the issue of claim accrual.

right to use of the surface (governed by Missouri law) did not come into effect before issuance of the NITU on March 25, 1992. Rather, they insist that their state interests could not take effect, and could therefore not be forestalled, until the Trail Use agreement was signed and title conveyed on December 30, 1992. In *Caldwell,* plaintiffs argue, the requisite formulation materialized when the NITU was issued; in this case, the formulation did not arise until December 30, 1992. Therefore, plaintiffs insist it was not until this date that their takings claim accrued.

Defendant responds that any potential distinction between Georgia and Missouri law regarding abandonment of railroad easements is irrelevant, given the breadth of the *Caldwell* decision. Defendant insists that the Federal Circuit's decision was not dependent on state law or on an assumption that the railroad company's abandonment caused plaintiff's right to use of the surface to vest prior to the issuance of the NITU. Rather, it argues that the decision leaves no room for this construction; that it is predicated on the operation and application of the Trails Act in general, regardless of specific state property law. The focus, it argues, is on the point at which the state law abandonment *process* is blocked or forestalled by federal action, even though the landowners are only later precluded from enjoying unencumbered fee title and full possession and use of their

land.[6] As a result, defendant claims, the issuance of the NITU operates as the blanket accrual date for all takings claims under the Trails Act, regardless of whether abandonment is complete prior to NITU issuance.

We find defendant's interpretation consistent with the apparent intent of the Federal Circuit in *Caldwell*. Without discussing Georgia law, or inquiring as to the timing of abandonment, the court unequivocally stated: "We therefore hold that the appropriate event for any takings claim under the Trails Act occurs when the NITU is issued." *Caldwell*, 391 F.3d at 1235.

Defendant's construction of *Caldwell* was adopted recently in *Renewal Body Works, Inc. v. United States*, 64 Fed. Cl. 609 (2005). There, the plaintiff filed a Trails Act takings claim on December 11, 2003, more than six years after the NITU was issued. *Id.* at 612. In an attempt to distinguish *Caldwell*, the landowner

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[6] Defendant claims that the interest taken when the ICC issues a NITU is the landowner's right to recover full unencumbered fee title. Defendant recognizes that sometimes the railroad company and intended trail user fail to reach an agreement, in which case the NITU converts into an effective notice of abandonment. When this happens, the landowner's takings claim that accrued on the date of the NITU ceases to be a permanent takings claim because the landowner regained full unencumbered fee title. The Federal Circuit noted, but failed to address, whether the landowner's taking claim that accrued on the NITU date becomes a temporary taking claim when no agreement is reached. *Caldwell*, 391 F.3d at 1234 n.7.

claimed that, in his case, the railroad company abandoned and state law reversionary interests took effect prior to the issuance of the NITU. *Id.* at 614. As a result, he argued that the alleged taking was the burden of a new easement on his property and not the blocking of state law reversionary interests. *Id.* The court stated:

> The Court need not determine whether the easement was abandoned prior to the issuance of the NITU .... *Caldwell* applies whether or not the easement was abandoned ... because in either case the only Government action that could give rise to plaintiff's taking claim was the issuance of the NITU.... This is true whether the alleged taking resulted from the blocking of state law reversionary interests or the imposition of a new burden on plaintiff's property. In either situation, the landowner's claim accrues on the date of NITU issuance.

Id. at 615. The court dismissed his claim as time-barred because the plaintiff filed his complaint more than six years after the NITU was issued, irrespective of when abandonment occurred.[7] *Id.* at 616.

Defendant offers other grounds for adopting its interpretation of *Caldwell*. It argues that plaintiffs' interpretation requires a false premise – that it is possible for a landowner to gain unencumbered fee

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[7] Plaintiffs in *Renewal Body Works* filed a Notice of Appeal on April 11, 2005.

prior to the issuance of a NITU. By definition, the Trails Act operates to preclude the execution of state law abandonment. *See Preseault v. ICC,* 494 U.S. 1, 8, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990) (indicating that, by deeming interim trail use as discontinuance rather than abandonment, Congress intended to "ensure that potential interim trail use [is] considered *prior to abandonment*") (quoting H.R. Rep. No. 98-28, at 8-9 (1983)) (emphasis added); *Caldwell,* 391 F.3d at 1233-34 (explaining that the NITU "operates to prevent abandonment . . . and to preclude the vesting of state law reversionary interests in the right-of-way").[8] Consequently, abandonment is never fully consummated and landowners can never gain unencumbered fee title prior to the issuance of a NITU. Defendant claims that if *Caldwell* stands for the presumption that a landowner must gain unencumbered access to his land prior to the accrual of a takings claim, landowners will never have standing to challenge the government's action in a Rails-to-Trails case. Although supportive of the result in *Caldwell,* we need

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[8] Furthermore, the ICC retains plenary authority over the regulation of railroad abandonments. *See Preseault v. ICC,* 494 U.S. 1, 8, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990). State law cannot operate until after the ICC relinquishes its jurisdiction by issuing a certificate of abandonment or exemption. *Id.* at 21-22 (O'Connor, J., concurring). Presumably, the ICC retains its jurisdiction after issuing the order allowing exemption and before issuing the NITU. Whether its jurisdiction is exclusive during this time period such that state law cannot effect an abandonment, however, need not be decided here.

not rely on this argument to determine the accurate interpretation of *Caldwell*.

We agree with defendant and *Renewal Body Works*. *Caldwell* imposes a new, blanket rule that the accrual of *any* takings claim under the Trails Act is the issuance date of the NITU. It is therefore unnecessary to determine the validity of plaintiffs' distinction between Georgia law and Missouri law.

B. *The Effect of the Caldwell Decision on this Court*

Plaintiffs' other arguments amount to the assertion that *Caldwell* is wrongly decided; that it is inconsistent with Supreme Court and Federal Circuit precedent.[9] We could agree with plaintiffs – we stated our views when defendant filed its first motion – but that would be irrelevant. The decisions of the Federal Circuit are binding on this court, even when they require retroactive application. *See, e.g., Sodexho Marriott Mgmt. v. United States*, 61 Fed. Cl. 229, 237 (2004). The Federal Circuit explained:

> the Court of Federal Claims may not deviate from the precedent of the United States Court of Appeals for the Federal Circuit any

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[9] It is worth noting that the arguments put forward here by plaintiffs mirror the arguments they put forward in their Brief of Amici Curiae in Support of Appellants' Petition for Rehearing *En Banc* filed in *Caldwell*. Despite those arguments, the Federal Circuit denied rehearing. *Caldwell v. United States*, 2005 U.S. App. LEXIS 16092, No. 03-5152 (Fed. Cir. Mar. 25, 2005).

> more than the Federal Circuit can deviate from the precedent of the United States Supreme Court. Trial courts are not free to make the law anew simply because they disagree with the precedential and authoritative analysis of a reviewing appellate court.

Crowley v. United States, 398 F.3d 1329, 1335 (Fed. Cir. 2005), *reh'g en banc denied*, (Apr. 27, 2005). *Caldwell* is the last word on the precise issue in front of us. We have no choice but to follow the majority opinion. If our interpretation of *Caldwell* is wrong, we would welcome reversal.

C. *Last Government Act Analysis*

In anticipation of our interpretation of *Caldwell*, plaintiffs suggest an alternative approach to preserving timeliness. It draws on the fact that the NITU in this case was amended after initial issuance. The amendment was within six years of filing the complaint. Similarly, the NITU in *Caldwell* was amended, but there the amendment was greater than six years prior to filing. Plaintiffs argue that the Federal Circuit treated both the date on which the original NITU was issued and the date of amendment as possible dates for accrual. The court considered the two dates as "potential dates of NITU issuance." *Id.* at 1235. Because both dates were outside of the limitations period, however, the plaintiff's claims were time-barred and the court did not need to address the issue directly. On that basis, plaintiffs argue that this court should find that their claim

accrued, not on the date of the original NITU issuance, but on the date when the last government action relating to the NITU occurred. Plaintiffs allege that by reopening the entire proceeding and vacating the original NITU with respect to 0.21 miles of railroad line, the government extended its action into April 1997. As a result, they argue, the six-year statute of limitations ran in April 2003, making timely their claim filed on December 28, 1998.

We believe this is an over-reading of *Caldwell*. Aside from identifying the two dates in *Caldwell* as "potential dates of NITU issuance," the court gives no guidance to whether those dates are two equally viable dates of claim accrual. What we believe to be of controlling significance is the court's explicit ruling that only one NITU is issued during the railbanking process. *Caldwell*, 391 F.3d at 1230. The reduction in scope of the NITU by 0.21 miles in this case, even if of legal importance, could only affect the limitations period for that section. More importantly, the interference with the process of recovering full use of the surface for the entire parcel unquestionably began on March 25, 1992. We view that as the new test under *Caldwell*, even for claims of permanent taking.[10] Plaintiffs therefore fail in their attempt to argue that their claim accrued in April 1997.

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[10] We note also one factual distinction. The entire segment here was affected by the original NITU. In *Caldwell*, portions of the corridor were unaffected by the original NITU.

The ICC issued the NITU on March 25, 1992. Plaintiffs filed their complaint on December 28, 1998. Applying *Caldwell* as interpreted above, because plaintiffs' complaint was filed more than six years after the NITU was initiated, plaintiffs' claim was filed too late.

Has the Statute of Limitations Defense Been Waived?

Plaintiffs argue that the statute of limitations is not a jurisdictional issue, but is instead an affirmative defense subject to waiver. Plaintiffs allege that defendant embraced the court's prior adverse ruling on the statute of limitations and failed to reserve the right to challenge it, thereby waiving its right to reassert the defence. We disagree.

We address first the question of whether the limitations defense is jurisdictional. The applicable statute of limitations states that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2000). The Federal Circuit has consistently held that this is a jurisdictional limitation. *E.g.*, *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002); *Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000); *see also Reed Island-MLC, Inc. v. United States*, 67 Fed. Cl. 27, 2005 U.S. Claims LEXIS 214, No. 04-11302, slip op. at 8 (Fed. Cl. July 22, 2005) (citing *Hopland Band of Pomo Indians v. United*

States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988)). Because this six-year statute of limitations is a requirement attached by Congress as a condition of the government's waiver of sovereign immunity, it cannot be waived by the parties or set aside by the court. *See, e.g., Alder Terrace, Inc. v. United States,* 161 F.3d 1372, 1376-77 (Fed. Cir. 1998) (finding that the six-year statute of limitations set forth in the statute "may not be waived by either the Court of Federal Claims or the parties"); *Hart v. United States,* 910 F.2d 815, 818-19 (Fed. Cir. 1990). As explained by this court in *S. Cal. Fed. S&L Ass'n v. United States,* 52 Fed. Cl. 444 (2002), "Notwithstanding its listing in Rule 8(c) as an affirmative defense, in our Court, where the United States is the only Defendant, the statute of limitations may be raised by the Defendant or *sua sponte* by the Court, and at any time." *Id.* at 452.

Although plaintiffs cite more recent Federal Circuit decisions, those decisions do not support their assertion that the applicable statute of limitations is non-jurisdictional and subject to waiver. Plaintiffs rely on *Venture Coal Sales Co. v. United States,* 370 F.3d 1102 (Fed. Cir. 2004) and *Ariadne Financial Services Pty. Ltd. v. United States,* 133 F.3d 874 (Fed. Cir. 1998) – two cases where the court distinguished between dismissal for lack of subject matter jurisdiction and dismissal on the grounds that the claim is barred by the statute of limitations. Although the court conceded that timeliness is not an issue of *subject matter* jurisdiction, it held that 28 U.S.C.

§ 2501 is a jurisdictional limitation. *Venture Coal,* 370 F.3d at 1105 n.2.

Plaintiffs' reliance on certain Supreme Court decisions is equally misplaced. Plaintiffs rely on *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990) (permitting equitable tolling in suits against the United States the same way it operates in suits against private parties) and *Franconia Associates v. United States,* 536 U.S. 129, 145, 153 L. Ed. 2d 132, 122 S. Ct. 1993 (2002) (refusing to recognize a special claim accrual rule for breach of contract cases against the United States because limitation principles apply to the United States in the same manner they apply to private parties). Neither case rejects the jurisdictional nature of section 2501. The fact that the limitations period is subject to tolling does not mean it is not jurisdictional. Furthermore, they are both consistent with the rule that the United States, as a defendant litigating a case in this court, cannot waive its statute of limitations defense.

Plaintiffs, however, claim that in *Scarborough v. Principi,* 541 U.S. 401, 158 L. Ed. 2d 674, 124 S. Ct. 1856 (2004), the Supreme Court rejected the jurisdictional classification of claim-processing rules, including section 2501. Dealing with a statute providing a deadline for filing attorney fee applications, the Court stated,

> 'Clarity would be facilitated if courts and litigants used the label "jurisdictional" not

> for claim-processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.'

Scarborough, 541 U.S. at 413-14 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455, 157 L. Ed. 2d 867, 124 S. Ct. 906 (2004)). The *Scarborough* decision does not conflict with the notion that when the United States is the defendant, a statute of limitations that operates as a condition on the waiver of sovereign immunity must be strictly construed and applied like a jurisdictional limitation not subject to waiver by the parties or the court. Because 28 U.S.C. § 2501 acts as a constraint on our ability to exercise subject matter jurisdiction, and because that limitation is not subject to waiver, we need not pursue plaintiffs' arguments that defendant waived its statute of limitations defense.[11]

Plaintiffs also allege that even if the statute of limitations is a jurisdictional issue that cannot be waived, defendant is precluded from asserting the defense because it stipulated that the date of taking was December 30, 1992, the date the Trail Use

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[11] We note, however, that defendant stipulated to liability only after we ruled that plaintiffs' claim accrued on December 30, 1992. *See* Joint Stipulations Related to Liability. Until that decision came into question under *Caldwell*, defendant was entitled to rely on our ruling. For this reason, defendant did not waive its right to re-assert the statute of limitations defense.

agreement was signed. Plaintiffs argue that defendant is bound by its stipulations and cannot now adopt a position that is contradictory to its prior stipulations. For a number of reasons, we disagree.[12]

It is true that the government is bound by its stipulations to the same extent that a private litigant is bound. *See H. Hackfeld & Co., v. United States,* 197 U.S. 442, 446-47, 49 L. Ed. 826, 25 S. Ct. 456 (1905) (acknowledging that no public policy rule prevents the United States attorney from stipulating to ultimate facts); *Judson v. United States,* 120 F. 637, 643 (2d Cir. 1903) (recognizing the authority of a private attorney to bind his client by stipulations and finding that "precisely the same rule must be applied to the United States appearing by its District Attorney"); *United States v. Fallbrook Pub. Util. Dist.,* 165 F. Supp. 806, 821 (S.D. Cal. 1958) (recognizing the power to enter stipulations on behalf of the United States as a necessary exception to the general rule that United States Attorneys have limited authority to bind the government). Nevertheless, stipulations that are contrary to the law may be ignored. *Kaminer Constr. Corp. v. United States,* 488 F.2d 980, 988, 203 Ct. Cl. 182 (Ct. Cl. 1973) (holding that "in instances

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[12] It appears that plaintiffs attempt to invoke the doctrine of equitable estoppel. In order to do so, plaintiffs must show "affirmative governmental misconduct." *See Frazer v. United States,* 288 F.3d 1347, 1354 (Fed. Cir. 2002). We decline to view as misconduct defendant's reliance on our earlier decision establishing December 30, 1992 as the date of taking. Accordingly, we decline to apply the doctrine of equitable estoppel.

where a stipulation is . . . contrary to law, . . . this court may disregard the stipulation"). More particularly, a party may be relieved of a stipulation when there has been an intervening change in law. *See Am. Honda Motor Co. v. Richard Lundgren, Inc.*, 314 F.3d 17, 21 (1st Cir. 2002) (finding that "a party may be relieved of a stipulation for good cause" and that "an intervening change in law might count as good cause"). In *Stephenson v. United States*, 33 Fed. Cl. 63 (1995), for example, the parties stipulated to the date of taking. *Id.* at 65. Relying in part on the Supreme Court's decision in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 81 L. Ed. 2d 1, 104 S. Ct. 2187 (1984),[13] the court declared that it was "not bound to accept the parties' stipulation as to the date of taking. . . ." 33 Fed. Cl. at 65 n.2. Accordingly, the court allowed the government to withdraw its stipulation. *Id.* at 65.

Our construction of the stipulations is that the government stipulated to no more than that, in light

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[13] In *Kirby Forest Industries, Inc. v. United States*, the parties stipulated that the date of taking was March 6, 1979, the first day of trial. 467 U.S. at 7. After determining that the stipulation pertained to the date as of which the land was to be valued, not the date on which the Government took the land, the Fifth Circuit found that the stipulation was not controlling and that the date of taking was actually March 26, 1982, the day on which compensation was paid. *Id.* at 8-9. Finding no reason to disagree, the Supreme Court affirmed the idea that the parties' stipulation did not control the Court's determination of the date of taking. *Id.*

of our prior rulings, it was liable to plaintiffs.[14] Even if we assume, as plaintiffs allege, that defendant specifically stipulated to the date of taking being December 30, 1992, any such stipulation is contrary to *Caldwell*. For that reason, the stipulation may be disregarded. As an intervening change in law, the *Caldwell* decision provides a sufficient basis for this court to set aside the parties' stipulations. Moreover, following the rationale accepted by this court in *Stephenson*, we are not bound to accept a stipulation as to the date of taking. It is *Caldwell* that is binding, not the stipulations. Despite the litigation history of this case and the near-settlement position in which the parties found themselves three days prior to *Caldwell*, we cannot preclude defendant from re-asserting its statute of limitations defense.

CONCLUSION

In light of *Caldwell*, the accrual date of plaintiffs' takings claim is March 25, 1992, when the ICC issued the NITU. Because plaintiffs filed their complaint on December 28, 1998, more than six years after the claim accrued, their claim is barred by the statute of

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[14] Defendant did state, "The takings claims alleged in plaintiffs' class action complaint accrued on December 30, 1992." This was in the context of responding to Plaintiffs' Motion for Amendment of the Entry of Appearance for Claimant Molly Bramoweth. We attach little significance to this. By that point, we had ruled that plaintiffs' claim accrued on December 30, 1992. Defendant was entitled to rely on this ruling.

limitations. Therefore, defendant's motion to dismiss is granted. The clerk is directed to dismiss the complaint for lack of jurisdiction. Each side to bear its own costs.[15]

ERIC G. BRUGGINK
Judge

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[15] Defendant's Motion to Strike Plaintiffs' Sur-Reply as exceeding the page limit set by RCFC 5.2(b)(2) is denied as *moot*.

SARAH ILLIG, For Herself and as Representative of a Class of Similarly Situated Persons Plaintiff, v. The UNITED STATES, Defendant.

No. 98-934L

UNITED STATES COURT OF FEDERAL CLAIMS

61 Fed. Cl. 187; 2004 U.S. Claims LEXIS 166

July 12, 2004, Filed

COUNSEL: Mark F. Hearne, II and J. Robert Sears, Lathrop & Gage, L.C., St. Louis, Missouri, for the plaintiffs.

Kristine S. Tardiff and Joy Ryan, Environment & Natural Resources Division, United States Department of Justice, for defendant. With them on the briefs was Thomas L. Sansonetti, Assistant Attorney General.

OPINION BY: ERIC G. BRUGGINK,

OPINION

ORDER

Bruggink, *Judge*.

This is a class action brought by landowners pursuant to the Takings Clause of the Fifth Amendment. Plaintiffs claim that the National Trails System Act, as amended, 16 U.S.C. § 1241 (Supp. II 1996) ("Trails Act"), lead to an uncompensated taking of an easement over their lands. We permitted the action to proceed as an opt-in class action under RCFC 23. We earlier found in favor of plaintiffs on

liability. *See* Order of March 2, 2001. Pending is plaintiffs' "Motion for Amendment of the Entry of Appearance for Claimant Molly Bramoweth (Claim 14)." The parties disagree about the true nature of the motion, but we believe, in substance, that defendant is correct that granting the motion improperly would result in the addition of one or more new parties. Because the amendment is untimely in terms of our prior deadline for inclusion in the class, we deny the motion.

BACKGROUND

We found the date of taking to be December 30, 1992. This action was commenced on December 28, 1998, within a few days of the running of the limitations period. The two named plaintiffs were Sarah and Gale Illig. The nature of a class action, however, is such that identification of members of the class is tantamount to inclusion of those individuals nunc pro tunc back to the date of the original filing. If that were not the case, the running of the limitations period would become an issue. Thus, the fact that the deadline for identification of those persons who opted into the class came after the running of the limitations period is not a bar.

For that same reason, however, the integrity of the process of identifying members for inclusion in the class is critical. By order of April 27, 2000, the court adopted a process proposed by the parties for publishing notification of the suit and inviting

affected landowners to join by a date certain. The deadline was extended in subsequent orders, but ran out on January 4, 2001. Notification was sent to persons understood to be current owners of land along the rail bed, as well as persons thought to be owners at the date of taking, if there had been a sale. In addition, there were notifications published regularly in two newspapers. Later, the parties jointly presented a list of persons who indicated a desire to join the class. By order of January 31, 2002, the court accepted that list and closed the group of plaintiffs.

Plaintiffs now present the following facts in support of the pending motion. One of the parcels of land adjoining the rail bed is part of the common grounds of the Royal Arms Condominium Association. One of the listed individual plaintiffs is Molly Bramoweth. She is the fee owner of one of the condominiums in that development. As owner of an individual condominium, she is also a 1.34% owner in the common land abutting the rail bed. Neither the condominium association nor the other members of the condominium association have joined the suit. Plaintiffs now seek to substitute the association for Ms. Bramoweth. Defendant opposes the substitution.

DISCUSSION

Plaintiffs contend that substitution of the condominium association for Ms. Bramoweth does not trigger concerns about amendment or relation back. They view her claim as a "place holder" for the

condominium association. We disagree. There is a fundamental difference between Ms. Bramoweth's ratable share and the whole. Shares in the condominium by definition are discrete portions of the whole. The best evidence of this is the fact that plaintiffs' recovery as to this parcel would be approximately 60 times larger if they succeed in the substitution. Ms. Bramoweth is not the same juridical entity as the association, much less the other individual condominium owners. It can not be argued, in short, that the association or the other members of it are implicit in Ms. Bramoweth's notice. They are separate entities.

The matter cannot be approached, therefore, as a substitution of parties. Nothing has happened to prompt a substitution. Instead, plaintiffs would have to seek amendment to add new parties – either the other individual owners or the association. Such an amendment, however, would trigger concerns of the applicable limitations period, as well as the court's prior orders closing the class.

While it is undisputed that the tolling of the limitations period ended with the closing of the class, Rule 15 permits amendments to a complaint. Paragraph (c) of the rule deals specifically with relation back of amendments to change defendants, but does not mention changing or adding plaintiffs. Instead, the comments to the 1966 amendments to the FRCP state the following:

> The relation back of amendments changing plaintiffs is not expressly treated in

> revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.

The rule with respect to changing defendants is that relation back is permitted when allowed "by the law that provides the statute of limitations," or when the claim asserted in the amended pleading arose out of the same conduct, transaction, or occurrence as the original pleading, and, defendant had notice of the original proceeding. *See Moore v. United States*, 42 Fed. Cl. 595, 597 (1998); *see also Creppel v. United States*, 33 Fed. Cl. 590, 594 (1995).

The proposed amendment[1] here plainly relates to the same transaction or occurrence, and defendant was on notice of the original claim. It was on notice, moreover, not just of the claim as a whole, but of the claim as to the piece of land implicated in the current motion. Ms. Bramoweth owns an undivided interest in the whole parcel. In short, Rule 15 would not be a bar to amendment of the complaint to include the association's claim as to the entire common property adjoining the trail and would permit the relation back

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[1] Plaintiffs' motion characterizes the relief requested as an amendment of the entry of appearance of claimant Bramoweth. In our view, amending her entry of appearance more properly should be characterized as an amendment of the complaint to add an additional plaintiff or plaintiffs.

of that amendment to the filing date of the initial complaint.

As plaintiffs concede however, "the government's more compelling argument is not that the statute of limitations bars the amendment of the claim for a taking of the entirety . . . but, rather, that the proposed amendment is sought after the expiration of this court's deadline for submitting claims." Pl.'s Rep. to Def's Opp. to Amendment of the Entry of Appearance at 4. We agree. The real issue is whether the court will enforce the cutoff date for inclusion in the class. Plaintiffs urge that the court effectively waive the January 4, 2001 deadline solely for the condominium association on equitable grounds. We decline to do so.

Individual notice of the suit went to persons or entities who appeared in the records of the St. Louis County Assessor's Office and the St. Louis County Recorder of Deed's Office as owning an interest in the relevant parcels as of the date of taking, December 30, 1992. According to plaintiffs, Royal Arms Condominium Association was not identified in those records as owner of the relevant parcel as of the date of taking. Apparently it was unincorporated at the time. It came into existence in 1985 and was not incorporated until 1994. This suit was commenced in 1998, however, and the association was certainly in existence at the time the class notice went out.

We note that because plaintiff Molly Bramoweth was part of the suit, she and her counsel plainly were aware that the entire parcel at issue abutted the trail. We note also that, while notice did not go directly to the association, a series of general notices were published on six occasions in the St. Louis Post Dispatch and three times in a local journal. In addition to the association management, there were more than 70 other joint owners who would have been reached by the general notice. Notice was extensive and more than adequate under the circumstances.

Neither the condominium association nor any of its other constituent members filed an entry of appearance within the deadlines established by this court. This is not an instance of a mis-identification. The relevant persons simply failed to respond to what the parties agreed would be adequate notice. This fact does not warrant reopening the class nearly three years after the deadline for filing an entry of appearance, and more than two years after the class was closed. While defendant was on notice of the Bramoweth claim, and thus of the existence of the larger parcel, it would be prejudiced by the increase in size of the claim as to that parcel by a factor of more than 60.

CONCLUSION

For the reasons set forth above, the plaintiffs' motion for amendment of the entry of appearance is denied.

ERIC G. BRUGGINK

Judge

In the United States Court of Federal Claims

No. 98-934L
(Filed: January 31, 2002)

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SARAH ILLIG and GALE ILLIG,
for themselves, and as
representatives of a class of
similarly represented persons,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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ORDER

Pursuant to the joint status report of January 4, 2002, the following is ORDERED:

1. The class of plaintiffs in this action consists of the persons or entities in the list attached to the letter of January 22, 2002, filed contemporaneously herewith. The class is otherwise closed.

2. Pursuant to the parties' stipulation filed October 18, 2001, summary judgment is granted to all class members on the question of liability.

3. Paragraph 3 of the court's October 22, 2001 order remains in effect: The parties may proceed with discovery on the question of just compensation. On or before March 4, 2002, or 60 days after closure of the

class, whichever is later, the parties will exchange expert reports related to just compensation. On or before April 18, 2002, or six weeks following the exchange of expert reports (whichever is later), all depositions of experts shall be concluded.

In addition, the parties shall file a further joint status report on or before February 8, 2002, indicating whether the parties have agreed to a process for determining just compensation and, if necessary, proposing a revised schedule to accommodate that process.

/s/ Eric Bruggink
ERIC G. BRUGGINK
Judge

In the United States Court of Federal Claims

No. 98-934L
(Filed: October 22, 2001)

****

SARAH ILLIG and GALE ILLIG,
for themselves, and as
representatives of a class of
similarly represented persons,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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ORDER

The court has received the parties "Joint Stipulations Related to Liability and Joint Proposal Regarding Future Proceedings," filed October 18, 2001. In accordance with the joint stipulations and the parties' proposal, the following is ORDERED:

1. Plaintiffs' March 2, 2001 motion for partial summary judgment is granted with respect to named plaintiffs Sarah and Gale Illig. Determination of liability with respect to other individuals will await final determination of membership in the class.

2. Defendant will file any objections it has to inclusion of specific individuals in the class on or before January 4, 2002. Plaintiffs shall file any responses to

any objections on or before February 15, 2002. If defendant does not file objections on or before January 4, 2002, the parties will file a joint status report by that same date proposing the closure of the class.

3. Pending final resolution of class membership and of liability, the parties may proceed with discovery on the question of just compensation. On or before March 4, 2002, or 60 days after closure of the class, whichever is later, the parties will exchange expert reports related to just compensation. On or before April 18, 2002, or six weeks following the exchange of expert reports (whichever is later), all depositions of experts shall be concluded.

4. Further scheduling will be deferred until resolution of class membership.

/s/ Eric Bruggink
ERIC G. BRUGGINK
Judge

This opinion will not be published in the U.S. Court of Federal Claims Reporter because it does not add significantly to the body of law.

In the United States Court of Federal Claims

No. 98-934L
(Filed November 12, 1999)

SARAH ILLIG for herself and as representative of a class of similarly represented persons, Plaintiff, v. THE UNITED STATES, Defendant.	*	Takings; Rails-to-Trails; Limitation of Actions

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ORDER

BRUGGINK, *Judge.*

This takings case is before the court on the defendant's motion to dismiss pursuant to R.C.F.C. 12(b)(1) for lack of jurisdiction. Defendant argues that this suit was filed subsequent to the running of the six-year statute of limitations for actions filed against the United States. 28 U.S.C. § 2501 (1994). The court heard oral arguments from the parties on November 9, 1999. After careful review of the written submissions of the parties and consideration of the oral

arguments, the defendant's motion to dismiss is DENIED.

BACKGROUND.[1]

Plaintiff, and the members of the proposed class,[2] are owners of various parcels of land located in southern St. Louis County, Missouri, which form a 6.2 mile long corridor. For many years, the Missouri Pacific Railroad ("MoPac") operated a rail line along this corridor ("the Carondelet Branch"). Neither side disputes that, for most of the time that MoPac operated its railroad, it had a legal right to use the affected areas of plaintiff's land as a right-of-way for railroad purposes.

On February 7, 1992, MoPac filed a notice of exempt abandonment with the Interstate Commerce Commission (ICC). At the request of Gateway Trailnet, a trail operator, and pursuant to 49 C.F.R. § 1152.29 (1998), the ICC issued a Notice of Interim Trail Use (NITU) on March 27, 1992. The NITU provided that MoPac could negotiate with Gateway Trailnet to convert the Carondelet Branch into a trail suitable for recreational purposes. Pursuant to the NITU, if MoPac's negotiations were unsuccessful, and

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[1] The facts are drawn from the complaint or are otherwise uncontested by the parties.

[2] A motion for class certification is still pending before this court. All references to the singular "plaintiff" refer to both the named plaintiff and the proposed members of the plaintiff class.

it failed to enter into an agreement within 180-days, it would then be free to abandon its interests in the Carondelet Branch.

MoPac began negotiations with Gateway Trailnet but was unable to reach an agreement before the expiration of the 180-day period set forth in the NITU order. On October 6, 1992, the ICC issued a 60-day extension of the NITU until November 30, 1992. MoPac and Gateway Trailnet were still unable to come to an agreement and on December 4, 1992, the ICC issued a 30-day extension of the NITU until December 31, 1992.

On December 30, 1992, MoPac and Gateway Trailnet finalized a trail-use agreement by which Gateway Trailnet assumed all economic and legal responsibility for the maintenance of the Carondelet Branch as a recreational trail. While MoPac can petition the Surface Transportation Board to reopen all or part of the trail for railroad use, MoPac executed a quitclaim deed in favor of Gateway Trailnet; this quitclaim deed covered all of MoPac's interests in the lands that comprise the Carondelet Branch. The deed was recorded with the St. Louis County Recorder of Deeds on January 6, 1993.

DISCUSSION

Plaintiff alleges that the conversion of the Carondelet Branch from a rail line to a recreational trail, made possible by the Rails-to-Trails Act, 16 U.S.C. § 1247(d) (Supp. II 1996), constitutes a taking

without compensation in violation of the Fifth Amendment of the Constitution. The date of the alleged taking is December 30, 1992, when MoPac and Gateway Trailnet executed their agreement to convert the Carondelet Branch into a recreational trail. The suit was filed on December 28, 1998. Defendant, however, asserts that any takings claim plaintiff had against the government accrued on March 27, 1992, with the issuance of the NITU, and thus that the claim is untimely. The court finds the plaintiff's argument more persuasive.[3]

Upon issuance of the NITU, it was not a certainty that the Carondelet Branch would be transformed into a recreational trail. Indeed, as the series of extensions issued by the ICC demonstrates, it was highly possible that MoPac and Gateway Trailnet would never reach an agreement. In that event, MoPac would have abandoned its legal interests in the Carondelet Branch and the plaintiff would have then owned her parcel of land free and clear of any rights of MoPac. In short, while plaintiff may have been temporarily blocked in her use of the land, she could not and did not suffer any damage from a permanent taking until the MoPac-Gateway Trailnet agreement became a reality. Had plaintiff sued, claiming a permanent taking, before the agreement was finalized, dismissal for lack of ripeness would

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[3] It is noteworthy that the plaintiff seeks compensation for a permanent taking; not a temporary one. That distinction controls the result.

have been appropriate. *See Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985).

Defendant contends, however, that the March 27, 1992, NITU order was the only governmental action which could have had an effect on plaintiffs property rights, as MoPac and Gateway Trailnet were free to enter into an agreement at that point. Direct government action was at an end. As such, it is the natural point for the accrual of any claim plaintiff may have.

We disagree. As noted above, the NITU order merely set in motion a chain of events that could (and eventually did) lead to the event which plaintiff now claims constitutes a taking. Had MoPac and Gateway Trailnet failed to effect the conversion of the railway to a trail, the NITU would be rightly seen as having had no permanent legal effect on the property rights of the plaintiff. Prior to December 30, 1992, the effect of the NITU was inchoate; it merely threatened to permanently impinge plaintiffs property rights. The plaintiffs claim thus accrued when the MoPac-Gateway Trailnet agreement was executed.

CONCLUSION

The accrual date for the plaintiff's claim is December 30, 1992, the date of the agreement for interim trail use between MoPac and Gateway Trailnet. Plaintiff's claim is therefore not barred by the

statute of limitations. Defendant's motion to dismiss is denied.

It is further ordered that defendant file its response to plaintiff's Motion to Certify Class Action no later than January 14, 2000.

/s/ Eric Bruggink
ERIC G. BRUGGINK
Judge

INTERSTATE COMMERCE COMMISSION

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-3 (Sub-No. 98X)

MISSOURI PACIFIC RAILROAD COMPANY – ABANDONMENT EXEMPTION – IN ST. LOUIS COUNTY, MO

Decided: March 25, 1992

Missouri Pacific Railroad Company (MP) filed a verified notice for an exemption under 49 CFR 1152 Subpart F – *Exempt Abandonments* to abandon a 6.2-mile rail line between milepost 15.8, near Billman Spur, and milepost 22.0, near Broadway Junction, in St. Louis County, MO. A notice of exemption was served and published in the *Federal Register* (57 FR 6853) on February 28, 1992. The exemption is scheduled to become effective March 29, 1992.

By letter filed February 6 (confirmed by letter filed February 19), 1992, Gateway Trailnet, Inc. (Gateway) requested that a notice of interim trail use or abandonment (NITU) be issued. By letter (telecopier) filed March 2, 1992, MP expressed its willingness to negotiate with Gateway for interim trail use.

In light of MP's willingness to enter into negotiations, a NITU will be issued under 49 CFR 1152.29. The parties may negotiate an agreement during the 180-day period prescribed below. If no agreement is reached within 180 days, MP may fully abandon the line. *See* 49 CFR 1157.29(d)(1). Use of the

right-of-way for trail purposes is subject to restoration for railroad purposes.

The Missouri Department of Conservation (MDC) has informed the Commission's Section of Energy and Environment (SEE) that the Articulate false foxglove (*Tomanthera auriculata*), A blazing star (*Liatrus scarissa var. nieuwlandii*), and Rattlesnake root (*Prenanthes raccmosa*), all endangered plant species, exist in the vicinity of the involved right-of-way. SEE recommends that a condition be imposed requiring MP to consult MDC before conducting any salvage activities. The condition will be imposed.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is reopened.

2. The notice of exemption published in the *Federal Register* on February 28, 1992, exempting the abandonment of the line described above, is modified to the extent necessary to implement interim trail use/rail banking as set forth below and is further subject to the condition that Missouri Pacific Railroad Company consult the Missouri Department of Conservation before conducting any salvage activities.

3. Subject to the condition set forth above, MP may discontinue service, cancel tariffs for the line on not less than 10 days' notice to the Commission, and salvage track and related materials consistent with

interim trail use/rail banking after the effective date of this decision and notice. Tariff cancellations must refer to this decision and notice by date and docket number.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any liability arising out of the transfer of use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and the payment of any taxes that may be imposed on the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service.

6. If the user intends to terminate trail use, it must send the Commission a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, MP may fully abandon the line subject to the condition set forth above.

By the Commission, Joseph H. Dettmar, Acting Director, Office of Proceedings.

[SEAL]

/s/ Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-3 (Sub-No. 98X)

MISSOURI PACIFIC RAILROAD COMPANY –
ABANDONMENT EXEMPTION –
IN ST. LOUIS COUNTY, MO

Decided: October 1, 1992

On March 27, 1992, a decision and notice of interim trail use or abandonment (NITU) was served, authorizing a 180-day period for Missouri Pacific Railroad Company (MP) and Gateway Trailnet, Inc. (Gateway), to negotiate an interim trail use/rail banking agreement for that segment of the right-of-way between milepost 15.8, near Billman Spur, and milepost 22.0, near Broadway Junction, in St. Louis County, MO. The negotiating period was scheduled to be concluded by September 29, 1992.

On September 14, 1992, Gateway requested a 180-day extension of the trail use negotiating period and MP agreed to the request. On September 16, 1992, MP submitted an additional letter stating that it had reconsidered the extension request and is agreeable to an extension of the negotiating period only to November 30, 1992. On September 21, 1992, a letter requesting denial of the extension request was submitted by Dr. and Mrs. Raymond Jablonski.

The purpose of section 1247(d) of the Trails Act, 16 U.S.C. 1247(d), is to preserve rail corridors for possible reactivation in rail service (rail banking) by

permitting and encouraging their interim use as recreational trails. *See* Ex Parte No. 274 (Sub-No. 13B), *Policy Statement on Rails to Trails Conversions*, 55 *Fed. Reg.* 4026-28 (February 6, 1990). The Trails Act ensures that the right-of-way remains intact by authorizing interim trail use before abandonment occurs. Since Gateway indicates that MP is willing to continue trail use negotiations, an extension of time will promote the establishment of trails and rail banking consistent with the Trails Act. So long as abandonment has not been consummated and negotiations are continuing, the negotiating period may be extended beyond the initial 180 days provided in our rules. *See* Docket No. AB-6 (Sub-No. 295X), *Burlington Northern Railroad Company – Abandonment Exemption – In Franklin, Adams, Whitman, Lincoln, and Spokane. Counties, WA* (not printed), served December 11, 1990.

The Trails Act permits only voluntary negotiations by the railroad, so the extension will be for only the 60 days to which it agrees.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. The NITU negotiation period is extended for 60 days, from September 29 through November 30, 1992.

2. This decision is effective on its service date.

By the Commission, David M. Konachnik, Director, Office of Proceedings.

/s/ Sidney L. Strickland, Jr.
Sidney L. Strickland, Jr.
Secretary

(SEAL)

05-1255 JOHN BARCLAY, CONSTANCE BARCLAY, ROYER BARCLAY, ALTHEA BARCLAY, JOHN AMOS, MARCIA J. BACON, RONALD J. BARTEL, MELVIN BERGEN, JOHN E. BOYLE, JONATHAN EHRLICH, FLORENCE EHRLICH, DONALD GRAUMANN, RUBEN KLIEWER, ALVIN KROUPA, BARBARA KROUPA, BURDETT LEDELL, LEE DALE MILLER, VERNON MINNS, FRANK A. MITCHELL, MID KANSAS COOPERATIVE ASSOCIATION, JOHN F. OPAT, ROBERT PRESNELL, JANET REGIER, SONJA REGIER, DON REINHARDT, JANICE REINHARDT, MARY J. RODGERS, DARRELL THOMPSON, ROBERT TURNER, GENEVA TURNQUIST, DONALD TURNQUIST, CLARK E. WIEBE, and MARLENE J. WEBER, Plaintiffs-Appellants, v. UNITED STATES, Defendant-Appellee. 05-5109 RENEWAL BODY WORKS, INC., Plaintiff-Appellant, v. UNITED STATES, Defendant-Appellee.

05-1255, 05-5109

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

443 F.3d 1368; 2006 U.S. App. LEXIS 8789

April 11, 2006, Decided

COUNSEL: Cecilia Fex, Ackerson Kauffman Fex, PC, of Washington, DC, argued for plaintiffs-appellants John Barclay, et al. With her on the brief was Nels Ackerson.

Robert J. Rosati, of Fresno, California, argued for plaintiff-appellant Renewal Body Works, Inc.

Lane M. McFadden, Attorney, Appellate Section, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee in 05-1255. With him on the brief were Kelly A. Johnson, Acting Assistant Attorney General, and Kathryn E. Kovacs and John E. Arbab, Attorneys. John E. Arbab, Attorney, argued for defendant-appellee in 05-5109. With him on the brief were Kelly A. Johnson, Acting Assistant Attorney General, and Kathryn E. Kovacs, Attorney.

Mark F. (Thor) Hearne II, Lathrop & Gage L. C., of St. Louis, Missouri, for amici curiae Sarah Illig, et al. in appeal 05-1255. With him on the brief were J. Robert Sears and Alok Ahuja. Of counsel on the brief were Charles J. Cooper, David H. Thompson, and David M. Lehn, Cooper & Kirk, PLLC, of Washington, DC.

JUDGES: Before NEWMAN, DYK, and PROST, Circuit Judges. Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge NEWMAN.

OPINION BY: DYK

OPINION

The United States District Court for the District of Kansas and the Court of Federal Claims dismissed several landowners' Fifth Amendment takings claims challenging the operation of the National Trail Systems Act (the "Trails Act"), 16 U.S.C. § 1247(d).

Barclay, et al. v. United States, 351 F. Supp. 2d 1169 (D. Kan. 2004); *Renewal Body Works, Inc. v. United States*, 64 Fed. Cl. 609 (2005). Applying our decision in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), cert. denied 546 U.S. 826, 126 S. Ct. 366, 163 L. Ed. 2d 72 (2005) (mem.), both the district court and the Court of Federal Claims held that the claims were time-barred because they were filed more than six years after the Surface Transportation Board ("STB") issued the Notices of Interim Trail Use or Abandonment ("NITU"). We agree that *Caldwell* governs, and we affirm.

BACKGROUND

I

By 1990, the nation's interstate railway system had shrunk from its peak of 272,000 miles of track in 1920 to about 141,000 miles of track, and railroads continue abandoning track each year. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) ("*Preseault I*"). As the Supreme Court explained in *Preseault I*, the purpose of the Trails Act was to preserve unused railroad rights-of-way by converting them into recreational trails. *Id.* The mechanism is a STB order (a NITU) staying railroad abandonment during the pendency of trail use.

As described in detail in *Preseault I*, 494 U.S. at 7-8, *Preseault v. United States*, 100 F.3d 1525, 1537-40 (Fed. Cir. 1996) (en banc) ("*Preseault II*"), and

Caldwell, 391 F.3d at 1228-30, in order to abandon a line that is subject to STB jurisdiction, a railroad must apply to the STB under either 49 U.S.C. § 10903 (standard abandonment), or 49 U.S.C. § 10502 (abandonment by exemption).[1] All proceedings involved in these appeals were exemption proceedings. Under the Trails Act, the STB may issue a NITU, suspending exemption proceedings for 180 days to allow a third party to enter into an agreement with the railroad to use the right-of-way as a recreational trail. 49 C.F.R. § 1152.29(b)(2) and (d) (2005). If the railroad and the trail operator reach an agreement, "the NITU extends indefinitely to permit interim trail use. . . ." *Caldwell*, 391 F.3d at 1230; *see* 49 C.F.R. § 1152.29(d)(1). If no trail use agreement is reached, the NITU converts into an effective notice of exemption, allowing the railroad to "abandon the line entirely and liquidate its interest." *Preseault I*, 494 U.S. at 7; *see Caldwell*, 391 F.3d at 1230. While it retains jurisdiction over the right-of-way, the STB may reopen exemption proceedings to substitute a new trail operator, 49 C.F.R. § 1152.29(f), to accept late-filed trail use requests, 49 C.F.R. § 1152.29(e)(1), or to vacate a notice of exemption and issue a NITU when a railroad late files its statement of willingness to negotiate, 49 C.F.R. § 1152.29(g).

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[1] On January 1, 1996, the STB succeeded the Interstate Commerce Commission as the agency with authority to regulate the interstate rail system. 49 U.S.C. § 702 (2000). We use "STB" to refer to both agencies.

In *Preseault I*, the Court noted but did not resolve the claim that "Congress . . . violated the Fifth Amendment by precluding reversion of state property interests." 494 U.S. at 9; *see also id.* at 22 (O'Connor, J., concurring) (operation of the Trails Act "may delay property owners' enjoyment of their reversionary interests," which "burdens and defeats the property interest"). In *Preseault II*, we established that the elimination of adjacent landowners' state law reversionary interests when abandonment is suspended under the Trails Act constitutes a Fifth Amendment taking. 100 F.3d at 1550-52. In *Caldwell*, we held that such a claim accrues for statute-of-limitations purposes when railroad abandonment proceedings are suspended by the STB's issuance of a NITU. *Caldwell*, 391 F.3d at 1235. The Barclay appellants (the appellants in No. 05-1255) and Renewal (the appellant in No. 05-5109) challenge both the correctness of the *Caldwell* decision and its applicability to the particular facts of their takings claims.

II

The Barclay appellants filed their Trails Act takings claims in the United States District Court for the District of Kansas on April 7, 2004. The complaint alleged that railroad rights-of-way running across the Barclay appellants' property in Kansas were converted into three different recreational trails (the Meadowlark, Sunflower, and Flint Hills trails) pursuant to the Trails Act, and that these conversions constituted Fifth Amendment takings. The government moved to

dismiss on the ground that the complaint was not filed within the six year statute of limitations. We decided *Caldwell* while the government's motion was pending. Because the initial NITUs for all three trails were issued prior to the cutoff date for the statute of limitations,[2] the district court dismissed the complaint.

The district court found that the Supreme Court's decisions in *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), and *Crown Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983), required tolling the statute of limitations for eleven months, three weeks, and one day, during the pendency of *Swisher v. United States,* 189 F.R.D. 638 (D. Kan. 1999), a class action alleging Trails Act takings in which the Barclay appellants were class members. The district court nevertheless concluded that the action was not timely filed, applying our holding in *Caldwell* that the claims accrued on issuance of the original NITUs. The district court rejected contentions that replacement NITUs, rather than the initial NITUs, triggered the accrual of their claims for the Flint Hills and Sunflower trails, holding that subsequently issued NITUs covering the same rights of way "merely continued in effect the blocking of the

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[2] The relevant NITUs were issued on September 28, 1995 (Meadowlark trail), April 12, 1996 (Sunflower trail), and March 31, 1995, and May 24, 1996 (Flint Hills trail). As noted the complaint was filed on April 7, 2004.

reversionary interests begun by the first NITU" and "could not amount to a separate taking of the property triggering a new claim. . . ." *Barclay*, 351 F. Supp. 2d at 1179. The Barclay appellants timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(2).

III

Renewal's complaint in the Court of Federal Claims alleged that Trails-Act conversion of a railroad right-of-way running across Renewal's property in California constituted a taking. The STB authorized abandonment effective May 28, 1995, and the putative trail operator filed a trail use request on May 23, 1995. The railroad had removed most of the track and equipment by July 1995, though abandonment had not been consummated under federal law. The STB subsequently issued a NITU on October 23, 1995, and the right-of-way was converted into a trail.

Renewal filed its complaint in the Court of Federal Claims on December 11, 2003. The Court of Federal Claims dismissed the complaint, relying on *Caldwell* to conclude that "Renewal's claim accrued on October 23, 1995, the day the NITU was issued," well outside the six-year limitations period. *Renewal*, 64 Fed. Cl. at 615. Renewal timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review both the district court's dismissal for want of jurisdiction and the legal conclusions of the Court of Federal Claims without deference. *Lion Raisins, Inc. v. United States,* 416 F.3d 1356, 1362 (Fed. Cir. 2005); *Applegate v. United States,* 25 F.3d 1579, 1581 (Fed. Cir. 1994). We agree with the district court and the Court of Federal claims that these actions are time-barred under our decision in *Caldwell.*[3]

I

We explained in *Caldwell* that "[t]he taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." *Caldwell,* 391 F.3d at 1233. Abandonment is suspended and the reversionary interest is blocked "when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)" of the Trails Act. *Id.* We concluded that "the issuance of the NITU is the only *government*

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[3] Because we agree with the district court that the Barclay appellants' claims were time-barred even assuming that the *Swisher* action tolled the limitations period, we do not decide here whether the *Swisher* action required tolling.

action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way." *Id.* at 1233-34 (emphasis in original). Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU. We explicitly held in *Caldwell* that "while the taking may be abandoned . . . by the termination of the NITU[,] the accrual date of a single taking remains fixed." *Id.* at 1235. The issuance of the NITU is the only event that must occur to "entitle the plaintiff to institute an action." *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994). Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.

II

The Barclay appellants and Renewal first argue that *Caldwell* was wrongly decided and should be overruled. Panels of this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*. *Kimberly-Clark Corp. v. Fort Howard Paper Co.*, 772 F.2d 860, 863 (Fed. Cir. 1985). The court declined to rehear *Caldwell en banc*, and the Supreme Court denied certiorari. *Caldwell v. United States*, 126 S. Ct. 366, 163 L. Ed. 2d 72 (2005) (mem.). In any event, the majority of these arguments were rejected in *Caldwell*. To the extent that they are new, they are without merit.

The appellants and amicii contend that *Caldwell* was wrongly decided insofar as it relied on federal rather than state law to determine when abandonment and reversion of railroad rights-of-way occur.

Renewal argues that because the railroad had removed its track and equipment from the right-of-way by June 1995, effectively abandoning it under California law and granting Renewal "full and exclusive, undisturbed, and uncontested possession and use" of the property until trail use began, App. Br. of Renewal at 17, the issuance of the NITU in October, 1995 did not block Renewal's reversionary interest. Thus, Renewal concludes that its claim did not accrue until it was physically ousted from the property when trail use began.

While state law generally creates the property interest in a railroad right-of-way, *Preseault I*, 494 U.S. at 8, 16,[4] "the disposition of reversionary interests [is] subject . . . to the [STB's] 'exclusive and plenary' jurisdiction to regulate abandonments" of railroad rights of way. *Id.* at 8 (quoting *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981)). Federal

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[4] In *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004), we reiterated that state law controls the basic issue of whether trail use is beyond the scope of the right-of-way. *Id.* at 1376-77. This merits question is distinct from the issue of claim accrual. *See also Hash v. United States*, 403 F.3d 1308, 1319-23 (Fed. Cir. 2005) (applying Idaho law to determine whether reversionary interests existed).

law dictates when abandonment occurs. Thus, Renewal is incorrect that state law governs the timing of the abandonment. Abandonment cannot occur until authorized by federal law, and the NITU precludes abandonment and the reversion that would follow if abandonment were consummated. 16 U.S.C. § 1247(d) (2000); 49 C.F.R. § 1152.29(d)(1); *Caldwell,* 391 F.3d at 1229; *Preseault v. Interstate Commerce Comm'n,* 853 F.2d 145, 151 (2d Cir. 1988) ("Until the [STB] issues a certificate of abandonment, the railway property remains subject to the [STB's] jurisdiction, and state law may not cause a reverter of the property."); *Nat'l Wildlife Fed'n v. Interstate Commerce Comm'n,* 271 U.S. App. D.C. 1, 850 F.2d 694, 704 (D.C. Cir. 1988) ("Nor may state law cause a reverter of a right-of-way prior to an [STB]-approved abandonment."). Thus, there could be no abandonment until authorized by federal law. The NITU barred the abandonment; abandonment cannot occur after issuance of a NITU while the NITU is in effect. The barrier to reversion is the NITU, not physical ouster from possession. As Renewal itself admits, after issuance of the NITU, "the easement continued in existence beyond the time when it otherwise would have been abandoned." Reply Br. of Renewal, at 4. Thus, the NITU triggers accrual.[5]

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[5] Renewal also appears to argue that the railroad conferred rights on Renewal to use the right-of-way for parking during the period of railroad use, and that the conversion to trail use ousted Renewal from the right to use the right-of-way for parking.

(Continued on following page)

The Barclay appellants' state law argument is also without merit. In the case of the Meadowlark trail, they insist that the NITU would not itself block a reversion if the railroad continued to use the right-of-way for railroad purposes after the NITU was issued. They argue that under Kansas law (which assertedly is different from California law), the taking can occur only after federal law authorized abandonment – that is, when the railroad ceases operations and the trail operator assumes physical possession. They thus urge that the trail operator's physical occupation, and not the Meadowlark trail NITU, blocked the reversion.[6] But even if under Kansas law the reversion would not occur until after federal authorization of abandonment, that state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU. It similarly makes no difference that railroad use may have continued after the NITU issued. The termination of railroad use was still delayed by the NITU.

III

The Barclay appellants also contend that *Caldwell* is distinguishable on a number of grounds.

Whether or not this is correct, the alleged ouster was not a consequence of actions taken under the Trails Act.

[6] Amicii Sarah and Gale Illig also advance this same argument.

A

The Barclay appellants argue that the original NITUs issued for the Flint Hills trail were vacated and that a second taking occurred when a new NITU was issued. Although issuance of a NITU requires that at least one trail operator file a statement of willingness to assume responsibility for the trail before issuance of the NITU, and that trail operator is listed in the NITU, the ordering clause of a NITU is not typically limited to a particular trail operator[7] and a railroad is free to negotiate a trail use agreement with any party. *See Rail Abandonments – Use of Rights-of-Way as Trails,* Ex Parte No. 274 (Sub. No. 13), 2 I.C.C. 2d 591, 605-06, 608, 1986 WL 68617 (1986) ("Rail Abandonments"); *Neb. Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 906 (8th Cir. 1997); *Goos v. Interstate Commerce Comm'n,* 911 F.2d 1283, 1293 (8th Cir. 1990). Nonetheless, it is common that, if after issuance of the NITU the trail operator named in the original NITU becomes unwilling or unable to assume responsibility for the trail, a new

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[7] *See, e.g., Cent. Kan. Ry., LLC – Abandonment Exemption – In Marion & McPherson Counties, KS,* STB Docket No. AB-406 (Sub. No. 6X), 1996 WL 169774 (1996) (original Sunflower Trail NITU) (imposing no limitations on negotiating parties, referring only to "the trail user" in specifying the requirements for interim trail use); *Mo. Pac. R.R. Co. – Abandonment Exemption – In Morris & Dickinson Counties, KS,* STB Docket No. AB-3 (Sub. No. 121X), 1995 WL 137149 (1995) (Flint Hills trail, Dickinson Segment original NITU) (same); *Union Pac. R.R. Co. – Abandonment Exemption – In McPherson County, KS,* STB Docket No. 33 AB-33 (Sub. No. 89X), 1995 WL 569357 (1995) (same).

operator will be able to be formally substituted by issuance of a new NITU before an agreement with the railroad is reached. It is also common for the original trail operator to become unwilling or unable to serve after an agreement is reached with the railroad, and for the original trail operator to propose to transfer trail use rights and responsibilities to a new trail operator. *See Rail Abandonments,* 2 I.C.C. 2d at 606-08 (recognizing such "serial trail use" as appropriate).

The regulations provide a mechanism for substituting trail operators and updating NITUs without abandonment. The original and replacement trail operators file a notice in accordance with 49 C.F.R § 1152.29(f)(1). Then, a new NITU (naming the new trail operator) is substituted for the original NITU (naming the original trail operator). As the regulation provides, "the board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user." 49 C.F.R. § 1152.29(f)(2). There is no gap between the original and replacement NITUs. Though formally "vacating" the original NITUs, the STB makes clear that, in substance, it is "substituting" trail users "in the [same] proceedings."[8]

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[8] *See Mo. Pac. R.R. – Abandonment Exemption – In Osage, Lyon, & Morris Counties, KS,* STB Docket No. 3 Ab- (Sub. No. 111X), *Mo. Pac. R. Co. – Abandonment Exemption – In Miami, Franklin, & Osage Counties, KS,* STB Docket No. 3 AB- (Sub. No. 115), *Mo. Pac. R. Co. – Abandonment Exemption – In Morris*

(Continued on following page)

Under these circumstances, we agree with the district court's conclusion that the series of STB NITU orders must be viewed as part of a single and continuous government action rather than as new takings. Any other approach would result in multiple potential takings of the same reversionary interest. In *Caldwell*, we rejected that approach, following *United States v. Dow*, 357 U.S. 17, 24, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958), where the Supreme Court dismissed as "bizarre" the contention that there could be "two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other." So long as abandonment was not consummated, the STB retained jurisdiction over the right-of-way. *See Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 236 (5th Cir. 2005); *Birt v. Surface Transp. Bd.*, 319 U.S. App. D.C. 357, 90 F.3d 580, 585 (D.C. Cir. 1996). Thus, any extensions or modifications of the original NITU were not separate potential takings.

B

No different result is required for the Sunflower Trail NITU. The initial Sunflower Trail NITU was set to expire on June 6, 1997. Although a new trail operator filed a request to be substituted and for the issuance of a new NITU on June 6, the STB did not issue

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& Dickinson Counties, KS, STB Docket No. AB-3 (Sub. No. 121X), 1997 WL 414314 (1997).

the NITU until 10 days later, on June 16, 1997. The Barclay appellants argue that under these circumstances the original NITU became inoperative, abandonment occurred, and the landowners' interest reverted. The replacement NITU in their view was a distinct government action that affected a new taking. Here again, however, the new NITU in substance merely extended the original NITU[9] and listed a new potential trail operator. Moreover, it is clear that the STB had authority to extend the NITU and that abandonment did not occur in the interim. *See Birt,* 90 F.3d at 585-87. In *Birt,* a landowner argued that the STB abused its discretion by retroactively extending a CITU (the version of the NITU issued in standard abandonment proceedings rather than exemption proceedings) eight days after the CITU expired. The District of Columbia Circuit disagreed, concluding that the STB retained jurisdiction over the right-of-way, and thus had authority to issue the extension, because the railroad did not consummate abandonment while the CITU was expired. *Id.* at 585-87. The new CITU became merely a continuation of the old. We agree with the District of Columbia Circuit's decision in *Birt.* Here, the railroad did not

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[9] *Cent. Kan. Ry., LLC – Abandonment Exemption – In Marion & McPherson Counties, KS,* STB Docket No. AB-406 (Sub. No. 6X), 1997 WL 323576 (1997) ("Upon reconsideration, the notice of exemption served . . . on March 13, 1996, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking . . . until December 13, 1997.").

consummate abandonment of the Sunflower Trail right-of-way or file a notice of consummation with the STB between June 6, 1997, the day the initial NITU expired, and June 16, 1997, the day the replacement NITU was issued.[10] Thus the new NITU was not a separate taking.

C

The Barclay appellants also insist that the Meadowlark Trail NITU did not block their reversionary interest because, unlike the NITU at issue in *Caldwell*, it contained a 180-day public use condition issued pursuant to 49 U.S.C. § 10905. The public use condition requires offering rights-of-way for sale to parties interested in using the property for, *inter alia*, "highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." 49 U.S.C. § 10905 (2000). Here, at the time of the issuance of the NITU, a trail operator was named and the railroad had stated its willingness to negotiate a trail use agreement. The trail operator alternatively requested the issuance of the public use condition, apparently on the theory that a public use

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[10] As of December 24, 1996, the railroad must file a notice of consummation of abandonment with the STB within one year of the effective date of the notice of exemption permitting abandonment. 49 C.F.R. § 1152.29(e)(2); 61 Fed. Reg. 67876-01, 67896-97 (Dec. 24, 1996) (adding § 1152.29(e)(2)). The STB retains jurisdiction over the right-of-way until the notice of consummation is filed. *See Baros*, 400 F.3d at 236.

condition would preserve the right-of-way for trail use. In accordance with its policy, the STB issued both conditions simultaneously. The STB in the NITU made clear that the public use condition was "subject to the execution of a trail agreement," and that "if an interim trail use/rail banking agreement is executed within the 180-day period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line segment." *Union Pac. R. Co. – Abandonment Exemption – In McPherson County, KS*, STB Docket No. AB-33 (Sub. No. 89X), 1995 WL 569357, (1995) ("*Meadowlark NITU*"). No agreement was reached under the public use condition, and it expired after 180 days.

The Barclay appellants' theory appears to be that if the right-of-way were purchased under the public use condition for a use that was within the scope of the right-of-way, for example, continued rail use for mass transit, reversion might not have occurred under state law, and hence that the blockage of the reversion did not occur until the public use condition expired.

We do not think that *Caldwell* can be distinguished on this basis. The primary object of the NITU was to preclude abandonment and thus to enable a trail use agreement. But for the NITU's trail use condition, the railroad could abandon the line immediately and trigger the reversion, since the public use condition did not itself preclude abandonment. *See Fritsch v. Interstate Commerce Comm'n*, 313 U.S. App. D.C. 252, 59 F.3d 248, 252 (D.C. Cir. 1995)

(section 10906 precludes sale or other disposal of the right-of-way, but not abandonment); *Nat'l Wildlife Fed'n*, 850 F.2d at 701-02 (what is now section 10905 "has no rail banking provision that would preempt state laws that could otherwise result in reversion of rights-of-way to abutting landowners upon a cessation of rail service"). The bar on abandonment effected by the NITU's trail use condition triggered accrual of the cause of action here just as it did in *Caldwell*.

D

Finally, the Barclay appellants argue that their Sunflower Trail claims did not accrue when the initial NITU was issued on April 12, 1996, because after the replacement NITU was issued on June 16, 1997, a group of landowners petitioned to reopen the exemption proceeding and vacate both the initial NITU and the replacement NITU. The petitioners argued that the railroad omitted material facts in its notice of exemption and that CKC was financially unfit to serve as trail operator. The STB denied the petition to reopen on December 18, 1998. The petitioners appealed to the District of Columbia Circuit, which affirmed in part and reversed in part on October 22, 1999. *See Jost v. Surface Transp. Bd.*, 338 U.S. App. D.C. 289, 194 F.3d 79 (D.C. Cir. 1999). On remand, the STB further explained its reasoning and again denied the petition on May 8, 2001. That denial was not appealed.

The Barclay appellants contend that their claim did not accrue until the petition to reopen was finally denied on May 8, 2001, even though the original NITU as extended by the replacement NITU never ceased to be effective. This is merely another version of the argument – rejected in *Caldwell* – that the original NITU should not be viewed as the taking because subsequent events might render the NITU only temporary. The Sunflower Trail claims accrued when the original NITU issued, regardless of the petition to reopen.

IV

In summary, we adhere to *Caldwell* and hold that the issuance of the original NITU triggers the accrual of the cause of action. The appellants' arguments in these cases urging a different trigger, depending on when abandonment occurred under state law, when the last NITU in a series was issued, or when the NITU was no longer subject to collateral attack, merely emphasize the correctness of the *Caldwell* rule. Appellants' arguments lead potentially to multiple takings of a single reversionary interest and endless litigation concerning the appropriate date for accrual, thus leaving landowners and the government in a state of great uncertainty as to their respective rights and obligations. Here, as in *Caldwell*, we conclude that takings law supplies a single bright-line rule for accrual that avoids these adverse consequences.

CONCLUSION

The decisions of the district court and Court of Federal Claims dismissing the appellants' complaints are

AFFIRMED.

COSTS

No costs.

DISSENT BY: NEWMAN

DISSENT

NEWMAN, Circuit Judge, dissenting.

The panel majority holds that a Fifth Amendment taking occurs in a rails-to-trails case, and is actionable for compensation, on the date the government issues a Notice of Interim Trail Use or Abandonment ("NITU"). Such Notice announces the railroad's right to abandon railway use and negotiate with a potential trail operator. If an agreement for interim trail use is reached, the right-of-way is railbanked for possible future railway use. 16 U.S.C. § 1247(d). If such an agreement is not reached within 180 days, or an extension thereof, the right-of-way is deemed abandoned and any easements therefor are extinguished in accordance with the applicable state law. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 7 n. 5, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) ("If agreement [for interim trail use with a qualified trail operator] is reached, interim trail use

is thereby authorized. If not, the CITU or NITU automatically converts into an effective certificate or notice of abandonment."). Thus, the statute and the NITU do not make trail use mandatory, and if trail use is not achieved, the statute effects abandonment of railway use and reversion of the right-of-way easement.

A Fifth Amendment taking cannot occur simply upon issuance of a NITU, because the deprivation of the reversion has not yet occurred, and may never occur. If railway use is simply abandoned, the easement is extinguished, the property is unburdened, and no taking occurs. Thus the issuance of a Notice of Interim Trail Use or Abandonment is not a *per se* taking, and no right of compensation arises on issuance of the Notice. My colleagues err in holding that the period of limitations for Fifth Amendment compensation starts to accrue, and that an action can be brought, immediately upon issuance of the NITU. As explained in *Hair v. United States* 350 F.3d 1253 (Fed. Cir. 2003), a period of limitations does not accrue until an issue is actionable:

> The basic rule is that the clock of a statute of limitations begins to run from the date the plaintiff's cause of action "accrues," . . . A cause of action "accrues" when the plaintiff has a complete and present cause of action. "The earliest opportunity for a complete and present cause of action is that moment when the plaintiff has suffered a legally recognizable harm at the hands of the defendant,

> such as the time of contract breach or the commission of a tortious wrong."

Id. at 1260 (quoting 1 Calvin W. Corman, *Limitation of Actions* § 6.1 (1991)).

As discussed in *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996), the conversion of a railroad right-of-way to a recreational trail can constitute a Fifth Amendment taking. However, the cause of action and right to compensation do not vest until the claim accrues. In *Boling v. United States,* 220 F.3d 1365 (Fed. Cir. 2000) this court reiterated that: "In general, a takings claim accrues when 'all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.'") *Id.* at 1370 (quoting *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1577 (Fed. Cir. 1988)). From my colleagues' ruling that a taking occurred as soon as the possibility arose for trail conversion as an alternative to abandonment of the right-of-way, I must, respectfully, dissent.

The general rule in physical takings cases is that the taking is actionable when the property is taken and liability is fixed, not when it is suggested to be taken. In *United States v. Clarke,* 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980) the Court stated that "physical takings by governmental bodies that may entitle a landowner to sue for compensation," 445 U.S. at 256, occur with the occupation of the property: "Condemnation proceedings, depending on

the applicable statute, require various affirmative action on the part of the condemning authority. To accomplish a taking by seizure, on the other hand, a condemning authority need only occupy the land in question." 445 U.S. at 257. In *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 832, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) the Court made clear that it is the permanent occupation or permanent right of traversal that triggers the owner's right to compensation, not the commencement of negotiations. *See generally Dow. v. United States,* 357 U.S. 17, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958) (the taking occurred when the property was occupied, not when the deed was transferred some time later). In *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) the Court focused on the permanent physical occupation of the property in determining whether a taking had occurred, not the legislative or administrative events that authorized that occupation.

The NITU is prospective, and requires additional steps by the rail carrier and others before either of the two options authorized by the NITU will take legal effect. *See* 49 C.F.R. § 1152.29. The NITU does not require that the railroad must consummate an agreement for rails-to-trails conversion. 48 C.F.R. §§ 1152.29(d), (e)(2); *see National Wildlife Federation v. Interstate Commerce Comm'n,* 271 U.S. App. D.C. 1, 850 F.2d 694, 700-02 (D.C. Cir. 1988). As discussed in the context of whether the issuance of a NITU must

be preceded by an environmental impact study, the tentative aspect of the NITU is stressed:

> Issuance of an NITU or CITU is not only incidental to the abandonment, but also is itself not a guarantee of eventual trail use. The NITU or CITU serves only "to provide an opportunity for the railroad and prospective trail users to negotiate an agreement; thus, when [the STB issues] a NITU or CITU there is only a *possibility* that a particular right-of-way actually will be used as a recreational trail."

Goos v. Interstate Commerce Comm'n, 911 F.2d 1283, 1293 (8th Cir. 1990) (emphasis in original).

When the government issued the NITU herein, it was not known whether the right-of-way would be converted to a recreational trail. If the ensuing negotiations had failed, such that the trail did not come into being, there could be no taking based on trail use. A suit for compensation is not ripe until the taking occurs. The panel majority states that "the termination of railroad use was still delayed by the NITU," maj. op. at 9, producing the incongruity whereby despite the delay in abandonment, the majority holds that the cause of action had already accrued. A "delay" of possible conversion to trail use, while it remains unknown whether trail use will occur at all, is not a *per se* taking with already vested entitlement to compensation. A taking claim does not accrue until "all events have occurred that fix the alleged liability of the Government and entitle the

plaintiff to institute an action." *Seldovia Native Ass'n v. United States,* 144 F.3d 769, 774 (Fed. Cir. 1998). The plaintiffs herein could not have sued for compensation while the trail use negotiations were ongoing; the period of limitations cannot accrue before suit could have been brought. *Hair,* 350 F.3d at 1260.

Indeed, the panel majority reinforces this view in its recognition that "So long as abandonment was not consummated, the STB retained jurisdiction over the right-of-way." Maj. op. at 11. Yet the "key date for accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken." *Boling,* 220 F.3d at 1370 (citing *Seldovia*). A taking claim cannot accrue any earlier than when the indispensable event required to establish the government's liability has occurred. *See Hash v. United States,* 403 F.3d 1308, 1318 (Fed. Cir. 2005) ("On the railway's abandonment of its right-of-way these owners were disencumbered of the railway easement, and upon conversion of this land to a public trail, these owners' property interests were taken for public use, in accordance with the principles set forth in the *Preseault* cases.")

The panel majority errs in holding that the railroad's "willingness to negotiate a trail use agreement," maj. op. at 1377, is an actionable Fifth Amendment taking. Although my colleagues extol the virtues of a "bright line" for accrual of the period of limitations, citing *Caldwell v. United States,* 391 F.3d 1226 (Fed. Cir. 2004), their choice of bright line would vest compensation rights although no taking may

ever occur. The issuance of a Notice of Interim Trail Use is not a taking, whether or not railway use has already been abandoned, and independent of when trail use is successfully consummated. For a taking, "the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore v. Kansas* [sic], 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). As elaborated in *Preseault,* 100 F.3d at 1530 ("We find no support in Vermont law for the proposition, propounded by the defendants and accepted by the dissent, that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails."), liability for a taking is based on the change in use of the easement from railroad use to recreational trail. Until that change is fixed and its occurrence firm, there is no accrual of the right to recover compensation for such taking.

To the extent that *Caldwell* is construed to hold otherwise, as does the panel majority, *Caldwell* warrants review. We should sit *en banc* for this purpose, for the government advises that there are some twenty-two pending cases arising from the National Trails System Act. It is appropriate and necessary for this court to clarify the inconsistencies in our precedent.

LEXSEE 391 F.3D 1226

WILLIAM B. CALDWELL, III and BEN FRANK BILLINGS, III (for themselves and as representative of a class of similarly situated persons), Plaintiffs-Appellants, v. UNITED STATES, Defendant-Appellee.

03-5152

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

391 F.3d 1226; 2004 U.S. App. LEXIS 25926

December 14, 2004, Decided

COUNSEL: Jeffrey O. Bramlett, Bondurant, Mixson & Elmore, LLP, of Atlanta, Georgia, argued for plaintiffs-appellants. With him on the brief were Benjamin E. Fox and Sarah M. Shalf. Of counsel on the brief was James P. Kelly, Kelly Law Firm, P.C., of Atlanta, Georgia.

Kathryn E. Kovacs, Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Thomas L. Sansonetti, Assistant Attorney General; John Smeltzer, Attorney, of Washington, DC; and Kristine S. Tardiff, Trial Attorney, General Litigation Section, of Concord, New Hampshire. Of counsel on the brief was Evelyn Kitay, Office of the General Counsel, Surface Transportation Board, of Washington, DC.

JUDGES: Before NEWMAN, DYK, and PROST, Circuit Judges. Opinion for the court filed by Circuit Judge DYK. Dissenting opinion filed by Circuit Judge NEWMAN.

OPINION BY: DYK

OPINION

DYK, Circuit Judge.

Appellants William B. Caldwell, III and Ben Frank Billings, III (collectively "Caldwell") brought a class action lawsuit seeking compensation for an alleged taking pursuant to the National Trail Systems Act (the "Trails Act"), 16 U.S.C. § 1247(d). The Court of Federal Claims held that the appellants' claim was barred under the applicable statute of limitations, 28 U.S.C. § 2501, because it accrued more than six years before the lawsuit was filed. *Caldwell v. United States,* 57 Fed. Cl. 193 (2003). Because the appellants' claim accrued when the exemption proceedings were halted by the issuance of a Notice of Interim Trail Use or Abandonment ("NITU"), we affirm.

BACKGROUND

I

We have previously held that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use. *Preseault v. United States,* 100 F.3d

1525, 1543 (Fed. Cir. 1996) (en banc) ("*Preseault II*"); *see also Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). This case requires us, for the first time, to determine when the Fifth Amendment takings claim accrues for purposes of the six-year statute of limitations under the *Tucker Act*. 28 U.S.C. § 2501 (2000). The following is a brief summary of the Trails Act, which is described in some detail in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 7-8, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1989) ("*Preseault I*"), the case in which the Supreme Court upheld the constitutionality of the Act under the Commerce Clause.

The Surface Transportation Board (the "STB" or "Board")[1] has authority to regulate the construction, operation, and abandonment of most railroad lines in the United States. A railroad seeking to abandon a railroad right-of-way within the jurisdiction of the STB must either: (1) file a standard abandonment application that meets the requirements of 49 U.S.C. § 10903; or (2) seek an exemption, under 49 U.S.C. § 10502.[2] If

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[1] The Surface Transportation Board is the successor agency to the Interstate Commerce Commission and assumed control on January 1, 1996. 49 U.S.C. § 702 (2000). We use "STB" to refer to both agencies.

[2] Authorization of abandonment pursuant to the exemption procedures of section 10502 is less involved than the standard abandonment proceedings detailed in section 10903 and can be invoked under the statute when it:

> (1) is not necessary to carry out the transportation policy of section 10101 of [Title 49]; and

(Continued on following page)

the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect. *See Preseault I,* 494 U.S. at 6-8.

The Trails Act, through a process known as "railbanking," provides an alternative to abandoning a railroad right-of-way under sections 10903 and 10502. Section 8(d) of the Trails Act allows a railroad to negotiate with a state, municipality, or private group (the "trail operator") to assume financial and managerial responsibility for operating the railroad right-of-way as a recreational trail.[3] *Id.* at 6-7. If the

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(2) either (A) the transaction or service is of limited scope; or (B) the [full abandonment proceedings are] not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502(a) (2000). In practice, exemption proceedings are appropriate if no local traffic has run on the line in at least two years. *See Nat'l Ass'n of Reversionary Prop. Owners ("NARPO") v. STB*, 158 F.3d 135, 138 n.4 (D.C. Cir. 1998).

[3] Section 8(d), codified at 16 U.S.C. § 1247(d), provides:

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. § 801 *et seq.*], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad

(Continued on following page)

railroad and the trail operator indicate willingness to negotiate a trail use agreement, the STB stays the abandonment process and issues a notice allowing the railroad right-of-way to be "railbanked." 49 C.F.R. § 1121.4. The effect of the notice, if the railroad and prospective trail operator reach an agreement, is that the STB retains jurisdiction for possible future railroad use and the abandonment of the corridor is blocked "even though the conditions for abandonment are otherwise met." *NARPO,* 158 F.3d at 139; *see also Preseault I,* 494 U.S. at 8. Specifically, section 8(d) provides that "such interim use [for trails] shall not be treated, for purposes of any law or rule of law, as

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rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d). Thus, section 8(d) of the Trails Act prevents the operation of state laws that would otherwise come into effect upon abandonment-property laws that would "result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners." *Rail Abandonments – Use of Rights-of-Way as Trails,* Ex Parte No. 274 (Sub-No. 13), 2 I.C.C. 2d 591, (1986). A *Fifth Amendment* taking occurs if the original easement granted to the railroad under state property law is not broad enough to encompass a recreational trail. *See Preseault II,* 100 F.3d at 1552; *see also Toews,* 376 F.3d at 1376. The statute does not specify in detail what procedures are to be followed under the Act. Pursuant to implementing regulations promulgated by the STB (and developed pursuant to notice and comment rulemaking), the typical railbanking process begins when a rail carrier files an abandonment application or, as in this case, a request for an exemption. 49 U.S.C. §§ 10903, 10502; *see also NARPO,* 158 F.3d at 138.

If the STB approves the request for an exemption, it will publish a notice of exemption in the Federal Register. 49 C.F.R. § 1121.4(b) (2004). A potential trail operator may then file a railbanking petition pursuant to 49 C.F.R. § 1152.29(a). Under section 1152.29(a) the petition must include: (1) a map of the right-of-way, (2) a statement indicating that the trail operator will assume financial and legal liability for the right-of-way, and (3) an acknowledgement that

the right-of-way may be reactivated for railroad use in the future.[4] If the railbanking petition meets these criteria, and the railroad agrees to negotiate with the petitioner and so communicates to the STB within ten days of the filing of the trail use petition, the STB will issue a Notice of Interim Trail Use or Abandonment ("NITU"). 49 C.F.R. §§ 1152.29(b)(2) and (d). This NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment, "consistent with interim trail use and rail banking" without consummating an abandonment and the NITU extends indefinitely to permit interim trail use once an "agreement" is reached between the railroad and the trail operator. 49 C.F.R. § 1152.29(d)(1).

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[4] Specifically the regulation states that:

> The . . . petition must include:
>
> (1) A map depicting, and an accurate description of, the right-of-way . . . proposed to be acquired or used;
>
> (2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way . . . and for the payment of all taxes assessed against the right-of-way; and
>
> (3) An acknowledgement that interim trail use is subject to the user's continuing to meet its responsibilities . . . , and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

49 C.F.R. § 1152.29(a) (2004).

In some cases, such as that of the recreational trail at issue in *Preseault II*, an interim trail use agreement may in fact be reached prior to the issuance of the NITU. 100 F.3d at 1549-50. In other cases, however, such as the present case, the NITU is issued after the trail operator and the railroad indicate their intention to negotiate an agreement but prior to the finalization of an agreement.

Only one NITU is issued once the parties indicate their intent to negotiate for conversion of the corridor to trail use. If negotiations go as planned and an agreement is reached, the NITU extends indefinitely for the duration of recreational trail use subject to the trail operator's fulfillment of its agreed-upon obligations. The STB retains jurisdiction for possible future railroad use, and state law reversionary interests that would normally vest upon abandonment are blocked. *Preseault I*, 494 U.S. at 8. An "escape-clause" is also provided by the NITU such that if no agreement is reached within 180 days, the NITU "automatically converts into an effective . . . notice of abandonment," *id.* at 7 n.5, which permits the rail carrier to "abandon the line entirely and liquidate its interest." *Id.* at 7; *see also* 49 C.F.R. § 1152.29(d)(1). The regulations also allow the parties to request an extension of the negotiating period if more time is

necessary to reach a trail use agreement. 49 C.F.R. § 1152.29(e)(1).[5]

II

On July 5, 1994, the railroad in this case, Norfolk Southern Railway Company ("Norfolk"), filed a request for an exemption under 49 U.S.C. § 10505 (now § 10502) to abandon 7.4 miles of its railroad line located in Columbus, Georgia. Norfolk did not own this right-of-way in fee simple. Rather, Norfolk owned a railroad right-of-way easement that burdened larger parcels over which the line ran. On July 26, 1994, the STB published a notice of abandonment stating that – absent the filing of a petition to stay, e.g., a railbanking petition – the exemption would become effective August 25, 1994. The city of Columbus, Georgia ("the City") filed a railbanking petition and requested issuance of an NITU on August 15, 1994. After receiving notice from Norfolk indicating the rail carrier's willingness to negotiate a trail use agreement with the City, the STB issued an NITU on August 31, 1994. Before the expiration of the 180-day negotiating period, the City and Norfolk filed a "Joint Motion for an extension of the negotiation period provided in the [NITU]" by an additional 180 days. (J.A. at 399.) The City and Norfolk also requested

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[5] "The NITU . . . also provides that, if the user [later] intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date." 49 C.F.R. § 1152.29(d)(2).

that the NITU be extended to cover an additional 3.2 miles of railroad line adjacent to the 7.4 miles covered by the original NITU.[6] On June 2, 1995, the STB granted both requests. As a result, the proceedings involving the 3.2-mile segment were consolidated with those involving the original 7.4-mile segment, and the NITU negotiating period was extended to August 26, 1995.

On August 17, 1995, Norfolk entered into a purchase and sale agreement ("the purchase agreement") with the Trust for Public Land ("the TPL"), the entity chosen by the City to negotiate the rail-banking arrangement. Under the purchase agreement, Norfolk agreed to sell its railroad line right-of-way easement to the TPL for $1,000,000. Payment of the $1,000,000 (less $500 in earnest money) was to occur at a later date along with transfer of title to the right-of-way. The purchase agreement did not set a closing date, but provided that closing would "occur at a mutually agreeable time and location within three hundred sixty five (365) days." (J.A. at 415.) However,

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[6] Norfolk had already obtained permission in a separate proceeding to abandon the 3.2 mile segment, but had "not removed the tracks or taken any other action to consummate the abandonment." (J.A. at 402.) The decision in this prior proceeding was vacated and the abandonment application for the 3.2 mile segment reopened pursuant to 49 C.F.R. § 1152.29(c)(1), which provides: "[I]f abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate . . . NITU will be issued."

the purchase agreement also gave the TPL the right to terminate the purchase agreement "without liability for damages or for an action for Specific Performance, at any time prior to the Closing Date upon five (5) days written notice to [Norfolk]." (J.A. at 420.)

The purchase agreement was amended on April 18, 1996, to make clear that the conveyance was governed by section 8(d) of the Trails Act. On July 1, 1996, a second amendment was made to indicate the TPL's intent to assign its rights under the purchase agreement to the City. The second amendment also required the TPL and Norfolk to cooperate with the City to file a joint motion to further extend the NITU deadline. The following day the TPL assigned its rights under the purchase agreement to the City.

On July 5, 1996, the City informed the STB that a "railbanking agreement" had been reached, but requested that the NITU deadline be further extended "through the time of the actual transfer of the corridor to the interim trail manager, which [was] anticipated to occur on or before November 1, 1996, and to cover any gaps that may have inadvertently occurred in the railbanking negotiation period." (J.A. at 441-42.) On August 6, 1996, the STB granted the City's motion for an extension "to ensure that the NITU remains in effect until actual transfer of the corridor to the interim trail manager," finding the "extension of the NITU negotiating period [to be] warranted" and that "as long as an abandonment has not been consummated and the railroad agrees to negotiate, the Board's jurisdiction is not terminated."

(J.A. at 446.) Norfolk transferred its easement for the 10.6 mile railroad line right-of-way by quitclaim deed on October 9, 1996. The deed was recorded on October 11, 1996.

On November 2, 1996, the City filed a "Notification of Railbanking/Interim Trail Use Agreement" to "formally notify the [STB] that, on October 13, 1996, the railroad lines [were] transferred to the City of Columbus as interim trail manager pursuant to an interim trail use/railbanking agreement." (J.A. at 454.) The notification further stated that "as a result of the successful completion of this railbanking/interim trail use transaction, the NITU should now extend indefinitely." *Id.* This notice was entered into the STB record on November 5, 1996.

III

The appellants, Caldwell, own land that was burdened by the easement Norfolk owned for the 10.6 mile railroad line right-of-way that was the subject of NITU and the railbanking agreement. On October 7, 2002, Caldwell filed a complaint in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491, on behalf of themselves and the class of people who also owned land burdened by the railbanked easement. Caldwell alleged that the government's conversion of the 10.6 mile railroad right-of-way to trail use constituted a compensable taking because the conversion extinguished state law reversionary property interests that would otherwise take

effect following the cessation of railroad activities and subsequent abandonment of the easement for railroad use of the right-of-way.

On June 30, 2003, the Court of Federal Claims granted the government's motion to dismiss the complaint because the six-year statute of limitations under 28 U.S.C. § 2501 had run. *Caldwell,* 57 Fed. Cl. at 204. The court rejected Caldwell's argument that its takings claim accrued within the limitations period, when the right-of-way deed was transferred from Norfolk to the City on October 9, 1996. *Id.* at 197-99. The Court of Federal Claims also rejected the government's position that the statute began to run upon issuance of the NITU, concluding that the filing of a claim after the issuance of the NITU but before the identification of "an appropriate public agency to operate the trail" would be premature, relying on language in our *Preseault II* opinion. *Id.* at 200 (citing *Preseault II,* 100 F.3d at 1538). Instead, the Court of Federal Claims held that "the Government taking is fixed upon the signing of the Trail Use Agreement. At that time the provisions of the NITU become permanent, depriving plaintiffs of their rights in the land in question." *Id.* at 203. Thus, the court held that Caldwell's takings claim had to have accrued prior to July 5, 1996, the date the STB was informed that the purchase agreement had been reached. *Id.* at 203-04. Because Caldwell's claim was not filed until October 7, 2002, more than six years after July 5, 1996, the claim was barred by the statute of limitations. *Id.*

Caldwell filed a motion for reconsideration on July 15, 2003, arguing for the first time that a parallel class action, filed in a Kansas district court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), tolled the statute of limitations on Caldwell's claim. The Court of Federal Claims denied the motion for reconsideration on August 11, 2003. Caldwell timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the legal aspects of the determination by the Court of Federal Claims that the appellants' claim was barred by the statute of limitations without deference. *Applegate v. United States*, 25 F.3d 1579, 1581 (Fed. Cir. 1994).

I

The appellants argue that the Court of Federal Claims erred by holding that their claim was barred by the statute of limitations. Specifically, Caldwell urges that a taking under the Trails Act did not occur until the railroad line right-of-way was actually converted into a trail for interim trail use on October 11, 1996. We disagree.

The taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners

are blocked from so vesting. *Preseault II*, 100 F.3d at 1552; *see also Toews*, 376 F.3d at 1376. The question, then, is in the context of an exemption proceeding, when are state law reversion interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).

In implementing the *Trails Act*, the STB chose to place the primary responsibility for creating railbanking arrangements on the railroad and trail operator. The Board has stated that in order "to promote and expedite the *Trails Act* process" it has "declined to burden the *Trails Act* process, unnecessarily either by rule or adjudication." *Policy Statement on Rails to Trails Conversions*, Ex Parte No. 274 (Sub-No. 13B), slip op. at 4 (I.C.C. Jan. 29, 1990). Indeed, in the STB's view, it "lacks discretion to deny or condition a trails use proposal (other than to ensure that the statutory qualifications are met)." *Id.* at 3. As a result, the NITU is issued only after both the railroad and the trail operator indicate their intent to negotiate a trail use agreement. The process begins when the railroad initiates the abandonment process (either through standard abandonment or exemption procedures). 49 C.F.R. § 1152.29; *see also NARPO*, 158 F.3d at 138. Subsequently, the interested trail operator files a railbanking petition that meets the statutory requirements reiterated in 49 C.F.R.

§ 1152.29(a). If the railroad agrees to negotiate a trail use agreement and so communicates to the STB, the STB will issue an NITU as a matter of course. 49 C.F.R. § 1152.29(d)(1). Thus, contrary to the view of the Court of Federal Claims, the NITU is issued only after the trail operator has been identified, and moreover, has indicated its "willingness to assume full financial responsibility and liability for the line and to agree to the railbanking condition for potential future reactivation of rail service." Policy Statement on Rails to Trails Conversions, slip op. at 3.

The issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way. The task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator. Indeed, the regulations do not even require the railroad and the trail operator to notify the STB that an agreement has been finalized, although a formal request to vacate the NITU is required if the operator intends at some future time to terminate trail use. 49 C.F.R. § 1152.29(d)(2).

After a final trail use agreement is reached, the NITU remains in effect indefinitely and "abandonment cannot be accomplished under the . . . NITU until trail use terminates (without restoration of rail service)." Policy Statement on Rail Abandonments – Use of Rights of Ways as Trails, Ex Parte No. 274 (Sub-No. 13), 5 I.C.C.2d 370, 373 (1989). If, however, "no trail use agreement is reached within 180 days,

the . . . NITU converts into a . . . notice of abandonment," *id.*, which "permits the railroad to fully abandon the line." 49 C.F.R. § 1152.29(d)(1); *see also Preseault I*, 494 U.S. at 7 n.5. If no trail use agreement is reached within 180 days, but the railroad wishes to continue negotiations with the trail operator rather than consummate abandonment, the regulations also allow the NITU to be extended, as was done in this case. 49 C.F.R. § 1152.29(e)(1).

Thus, the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. *Preseault II*, 100 F.3d at 1552; *see also Toews*, 376 F.3d at 1376. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred.[7] It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it[8] accrues.

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[7] This case does not involve, and we do not herein address, whether the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached.

[8] *See Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004) (denial of permit triggers takings claim that, depending on later government action, may be temporary or permanent); *Cooley v. United States*, 324 F.3d 1297, 1299-300 (Fed. Cir. 2003) (same); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002) ("The initial denial of a permit

(Continued on following page)

Indeed, the Supreme Court has previously contemplated precisely this possibility. In *United States v. Dow*, 357 U.S. 17, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958), the Court also grappled with the issue of fixing the accrual of a takings claim. The question was whether the taking accrued at the time when the initial judgment of "immediate possession" was obtained, or three years later, when the government filed a declaration under the *Declaration of Taking Act* and title formally passed. At issue was respondent Dow's ability to collect compensation from the government, as Dow had purchased the property from the original owner after the government physicaliy occupied the property, but before the formal conveyance of title to the government. Dow had argued that no permanent taking occurred until the filing of the declaration and the formal passage of title, and that only a temporary taking occurred with the government's physical occupation of the land.

The Court held that the taking occurred at the earlier date, when the government entered into physical possession of the land and the owner was deprived of valuable property rights, even though title had not formally passed. *Id.* at 23. The Court

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is still a necessary trigger for a ripe takings claim. . . . If the government denies a permit, then the aggrieved party can seek compensation. If at some point the government reconsiders the earlier denial and grants a permit (or revokes the permitting requirement), then the aggrieved party can seek compensation for a 'temporary regulatory taking'.") (internal footnote omitted).

rejected, as "bizarre," the argument that there were "two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other." *Id.* at 24. Rather, the Court endorsed a rule similar to the one that we adopt here, namely that a taking occurs when the owner is deprived of use of the property, there by physical possession, here by blocking the easement reversion. While the taking may be abandoned – in *Dow,* by the government's possible surrender of possession prior to the formal passage of title, here by the termination of the NITU – the accrual date of a single taking remains fixed. As the Court observed in *Dow,* the government's decision to abandon the taking "merely results in an alteration in the property interest taken – from full ownership to one of temporary use and occupation." *Id.* at 26.

We therefore hold that the appropriate triggering event for any takings claim under the *Trails Act* occurs when the NITU is issued. The NITU marks the "finite start" to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued. *See, e.g., Seiber,* 364 F.3d at 1364.

II

Having determined that the appellants' takings claim accrued on the date when the NITU was issued, we must now determine if the six-year statute of limitations bars Caldwell's claim in this case. We hold

that the statute of limitations is a bar here under either of the two potential dates of NITU issuance. The first NITU was issued on August 31, 1994, for the 7.4-mile segment. The scope of the NITU was enlarged to cover the full 10.6 miles on June 2, 1995. Both of these dates are more than six years before the complaint in this case was filed, and therefore Caldwell's claim is barred by the statute of limitations.

III

Appellants further argue that our decision in *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000), would apply to toll the statute of limitations during the eleven-month pendency of a class action in Kansas filed by Cheryl Swisher in October 1998.

We conclude that Caldwell has waived on appeal the argument that the statute of limitations was tolled during the eleven-month pendency of the *Swisher* class action. This issue was first raised below not at trial, but in a motion for reconsideration under Rule 59(a) of the Rules of the Court of Federal Claims. While Caldwell reargues the merits of the tolling argument on appeal, Caldwell did not meet the rigorous standards of RCFC 59(a). Motions for reconsideration must be supported "by a showing of extraordinary circumstances which justify relief." *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000) (table). In particular, Caldwell fails to refute the

court's finding that raising the tolling argument for the first time on a Rule 59(a) motion was improper because the pendency of the 1998 Kansas class action was inherently knowable to Caldwell and should have been raised in response to the government's motion to dismiss for lack of jurisdiction. In any event, even with the claimed eleven months of equitable tolling, Caldwell's filing of October 7, 2002, is barred under the six-year statute of limitations, since his claim accrued no later than June 2, 1995.

CONCLUSION

We hold that the Fifth Amendment taking, if any, under the Trails Act is accomplished when an NITU is issued and state law reversionary interests that would otherwise take effect pursuant to normal abandonment proceedings are forestalled. Because Caldwell's claim was filed on October 7, 2002, more than six years after either of the NITUs issued in this case, that claim is barred by the statute of limitations under 28 U.S.C. § 2501. The decision of the Court of Federal Claims dismissing the appellants' claim is

AFFIRMED.

COSTS

No costs.

DISSENT BY: NEWMAN

DISSENT

NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the court's ruling that the statute of limitations started to accrue from a date before the Caldwell property was "taken" in *Fifth Amendment* terms. All authority is contrary to this position.

Neither the dates of the Interstate Commerce Commission's authorization to the Norfolk Southern Railroad to abandon railroad use and negotiate transfer of the easement (the ICC's Notices of Intent to Use, whose dates of August 31, 1994 and June 2, 1995 are selected by the panel majority as the dates on which the statute of limitations started to accrue), nor the date the City of Columbus notified the ICC of the intended trail use (the date of July 5, 1996 chosen by the Court of Federal Claims) was an actionable taking of property. Neither event vested a cause of action in the owner of the fee, for neither event was a ripened taking. Neither the federal approval to discontinue railway operations, nor the ongoing negotiation between the railway and the city concerning conversion to trail use, vested a right of compensation by the United States. Thus neither of these events started accrual of the six-year period of limitations of 25 U.S.C. § 2501. *See Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("a claim under the *Fifth Amendment*

accrues when the taking action occurs"); *Steel Improvement & Forge Co. v. United States,* 174 Ct. Cl. 24, 355 F.2d 627, 631 (Ct. Cl. 1966) (same).

A *Fifth Amendment* taking can indeed flow from a *Trails Act* conversion of a railway easement. *See Preseault v. United States,* 100 F.3d 1525, 1553 (Fed. Cir. 1996) (en banc). However, these plaintiffs could not have prosecuted their claim until the taking occurred. The taking occurs "when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Seldovia Native Association, Inc. v. United States,* 144 F.3d 769, 774 (Fed. Cir. 1998). Until the easement was transferred to the City of Columbus, Norfolk Southern Railroad not only continued as owner of the right-of-way, but retained all of the benefits and obligations of ownership, including the right to exclude, the obligation to pay taxes, and liability for injury and liens. Until the right of trail use was vested in the City the cause of action had not ripened, and liability of the government for compensation was not fixed. Suit at this stage would have simply been premature; the statute of limitations can not start to accrue before suit could have been filed.

Under the *Trails Act* and its implementing regulations, not only must an "interim trail manager" (the City of Columbus) be approved by the ICC, but the interim trail manager must "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be

levied or assessed against such rights-of-way." 16 U.S.C. § 1247(d) (1994). These obligations were not incurred until transfer of the deed at the legal Closing; until the Closing, the railroad continued to own the right-of-way, the City of Columbus did not possess and could not occupy the property, and the City could not convert it into a recreational trail. Until these events occurred the owners of the fee were not "clearly and permanently deprived," and the liability of the government to pay compensation was not fixed, *See Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 7-8, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990) (conversion to trail use may be subject to Tucker Act remedy for Fifth Amendment taking); *Seldovia,* 144 F.3d at 774 ("the key date for accrual purposes is the date on which Seldovia was clearly and permanently deprived of the lands it had selected").

On October 9, 1996 the Norfolk Southern Railroad conveyed to the City of Columbus the deed for the 10.6 mile right-of-way. I cannot agree that the plaintiffs could have brought earlier suit and obtained compensation for this taking, based on the ICC's authorizations on August 31, 1994 and June 2, 1995 to Norfolk Southern to negotiate a *Trails Act* conversion. These preliminary events did not fix a ripe takings claim. Negotiation of a possible future event may state a hope and a plan, but it is not a fixed, ripe, and compensable taking. The owners of the fee had no right to compensation based on or at the time of these authorizations to negotiate; thus

these authorizations could not accrue the period of limitations.

Nor were the various negotiating documents involving the City of Columbus, starting with the document of August 17, 1995 styled "Purchase Agreement," an actionable taking. This Agreement, from which the City could withdraw on five days' notice, was amended on April 18, 1996 to add the *Trails Act*'s requirement that the manager accept financial and legal responsibility; this acceptance in turn was conditioned on completion of the transaction, and only then would become operable. Thus an Amendment to the Purchase Agreement stated that "at closing Buyer, its successor or assignee, shall assume full responsibility for the management of the right of way, for any legal liability arising out of its transfer or use and for any payment of taxes in accordance with the requirements of section 8(d)." Another amendment dated July 1, 1996 provided that the City and the railroad would jointly request the ICC (now named the Surface Transportation Board) to extend the time period for negotiation of a "mutually acceptable interim trial use/railbanking agreement" through and including November 1, 1996. Thus the Agreement itself documented its own negotiating status; these documents could not have formed the basis of a takings action by July 5, 1996, as the Court of Federal Claims held in selecting the date when the City and the railway jointly requested the time extension for further negotiation. This Agreement and its amendments were recordations of the negotiation, not

a completed transaction having Fifth Amendment consequences.

Taking claims accrue when the liability of the government is fixed, not simply prospective. In *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573 (Fed. Cir. 1988) the court reiterated that

> for the purposes of section 2501, it would appear more accurate to state that a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence.

Id. at 1577. These events occurred when the City acquired the deed and the right to occupy and use the property. The Court explained in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 832, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), that permanent physical occupation occurs "where persons are given a permanent and continuous right to pass to and fro." That did not occur until the Closing, when the deed and the right of occupancy and use were transferred.[1] Before these events the period of limitations did not start to accrue, for neither the ICC's Notice that

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[1] It is not necessary to decide whether the date of accrual of the limitations period was the transfer of the deed at the Closing on October 9, 1996, or its recordation a few days later, or the Notification from the City of Columbus to the ICC on November 5, 1996, because this suit was filed within six years of the earliest of these dates.

permitted negotiation for trail use, nor the various documents implementing those negotiations, ripened a claim for compensation. Intentions are rarely actionable; it is the consummation that accrues legal rights.

The panel majority places great weight on *United States v. Dow*, 357 U.S. 17, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958). In *Dow* the Court held that a taking occurs upon possession and occupancy of the property, and that a subsequent filing under the Declaration of Taking Act did not negate the effect of the earlier possession and occupancy. *Id.* at 22. In *Dow* the government in 1943, by eminent domain, obtained a judgment of "immediate possession" of a right-of-way through a larger tract of land, entered into immediate possession of the right-of-way, and within ten days began laying a pipeline through the tract. In 1945 the owners conveyed the entire tract to Dow, including their right to any compensation for the land taken by eminent domain; and in 1946 the government filed in court a declaration of taking, obtained title to the right-of-way, and deposited estimated compensation with the court. The issue was Dow's rights under the Assignment of Claims Act; there was no issue of the running of a statute of limitations. The Court held that the taking occurred when the United States entered into possession in 1943, when the government "entered and appropriated the property to public use," *id.* at 23, and that the taking neither awaited the later transfer of title to the right-of-way, nor was negated by the later proceeding. The Court stressed that

the determinative event of the taking was whether "the Government has already entered into possession." *Id.* at 25. This case well supports the plaintiffs herein.

It is not disputed that the City of Columbus did not possess and occupy the property, and had no authorization or right to do so, until the Closing and transfer of the deed. Although the panel majority relies heavily on *Dow*, the analogy is not apt. In *Dow* the government was in full possession of the property it had obtained by condemnation decree and was actively building the pipeline; thus the Court held that the taking had occurred. In contrast, the authorization from the ICC to the Railway and the City to start to negotiate did not change the possession and occupancy of the easement. My colleagues' view that it is irrelevant when title passes does not mean that the property was earlier taken; that is not the rule of *Dow*. To the contrary, *Dow* strongly reinforces the position that the Norfolk Southern right-of-way was not taken and compensable until there was a transfer of possession and occupancy, an event that did not occur until the date of Closing and the transfer of the deed.

Thus I must, respectfully, dissent from the court's conclusion that the statute of limitations started to accrue when the parties told the ICC that they were negotiating for the purpose of reaching a trail use agreement.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

2005-5156

SARAH ILLIG and GALE ILLIG,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ON MOTION

ORDER

(Filed June 29, 2006)

The United States submits a letter, which the court treats as an unopposed motion to continue the stay of proceedings in this appeal pending the court's consideration of the petitions for rehearing in the companion cases *Barclay v. United States* and *Renewal Body Works v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), noting that this appeal had previously been stayed pending resolution of those two cases.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is granted. The United States is directed to inform the court within 14 days of the court's disposition of the petitions for rehearing in *Barclay* and *Renewal Body Works* how it believes

this appeal should proceed. The appellants may also respond within that time.

FOR THE COURT

Jun 29 2006	/s/ Jan Horbaly
Date	Jan Horbaly Clerk

cc: Kathryn E. Kovacs, Esq.
Mark F. Hearne, II Esq.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ILLIG V US, 2005-5156
(CFC-98-CV-934)

ORDER

(Filed Oct. 1, 2008)

A petition for rehearing en banc having been filed by the Appellants, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 8, 2008.

FOR THE COURT,

/s/ Jan Horbaly/JB
Jan Horbaly
Clerk

Dated: 10/01/2008

cc: Mark F. Hearne, II
Kathryn E. Kovacs

16 USCS § 1247. State and local area recreation and historic trails

(a) Secretary of the Interior to encourage States, political subdivisions, and private interests; financial assistance for State and local projects. The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans and proposals for financial assistance for State, local, and private projects submitted pursuant to the Act of October 15, 1966 (80 Stat. 915), as amended [*16 USCS §§ 470* et seq.], needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in the Act of May 28, 1963 (77 Stat. 49) [*16 USCS §§ 460l* et seq.], to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

(b) Secretary of Housing and Urban Development to encourage metropolitan and other urban areas; administrative and financial assistance in connection

with recreation and transportation planning; administration of urban open-space program. The Secretary of Housing and Urban Development is directed, in administering the program of comprehensive urban planning and assistance under section 701 of the Housing Act of 1954 to encourage the planning of recreation trails in connection with the recreation and transportation planning for metropolitan and other urban areas. He is further directed, in administering the urban open-space program under title VII of the Housing Act of 1961 [*42 USCS §§ 1500* et seq.], to encourage such recreation trails.

(c) Secretary of Agriculture to encourage States, local agencies, and private interests. The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.

(d) Interim use of railroad rights-of-way. The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation,

transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act [*16 USCS §§ 1241* et seq.], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act [*16 USCS §§ 1241* et seq.] and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(c) Designation and marking of trails; approval of Secretary of the Interior. Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

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49 CFR § 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to *16 U.S.C. 1247(d)*, it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To Assume Financial Responsibility

In order to establish interim trail use and rail banking under *16 U.S.C. 1247(d)* and *49 CFR 1152.29*, _____ (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by _____ (Railroad) and operated by _____ (Railroad). The property, known as _____ (Name of Branch Line), extends from railroad milepost _____ near _____ (Station Name), to railroad milepost _____, near _____ (Station name), a distance of _____ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB-___ (Sub-No. ___).

A map of the property depicting the right-of-way is attached.

___ (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b)(1) In abandonment application proceedings under *49 U.S.C. 10903*, interim trail use statements

are due within the 45-day protest and comment period following the date the abandonment application is filed. See § 1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with § 1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the Federal Register in the case of a class exemption and within 20 days after publication in the Federal Register of the notice of filing of a petition for exemption in the case of a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the

railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) Regular and NERSA abandonment proceedings.

(1) If continued rail service does not occur pursuant to *49 U.S.C. 10904* and *§ 1152.27*, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail user for that portion of the right-of-way to be covered by the agreement. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued (10 days after issuance in NERSA proceedings); and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The CITU will

also provide that, if the user intends to terminate trail use, it must send the Board a copy of the CITU and request that it be vacated on a specified date. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under *49 U.S.C. 10901* and 49 CFR part 1150, or exempted under *49 U.S.C. 10502*, then the CITU will be vacated accordingly.

(d) Exempt abandonment proceedings.

(1) If continued rail service does not occur under *49 U.S.C. 10904* and *§ 1152.27* and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if

no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of way is authorized under *49 U.S.C. 10901* and 49 CFR part 1150, or exempted under *49 U.S.C. 10502*, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been

consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under *49 U.S.C. 10903*, or by individual or class exemption issued under *49 U.S.C. 10502*) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding

conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Secretary of the Board. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the one-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

SARAH ILLIG, For Herself and As Representative of a Class of Similarly Situated Persons,	)	
Plaintiff,	)	Docket No.: 98-934L
v.	)	
UNITED STATES,	)	
Defendant.	)	

Chambers 305
National Courts Building
717 Madison Place N. W.
Washington, D.C.

Friday
June 17, 2005

The parties met, pursuant to notice of the Court, at 3:03 p.m.

BEFORE: HONORABLE ERIC G. BRUGGINK
Judge

* * *

[6] called: *Bath Enterprises* where almost a similar type of situation, in which you had a regulatory structure in place under which the plaintiff's property, which, in this case, it was oil and gas leases on federal lands, they were unable to drill for oil and gas on the property.

As the result of a subsequent government action, it was determined that oil and gas drilling could move forward. What the Federal Circuit said in that case is: Well, as a result of that subsequent action, there is no permanent taking. It is only a temporary taking. So it is kind of analogous.

THE COURT: Obviously, I am having a hard time visualizing what one would be measuring under those circumstances because what we tried here – it seems to me that *Caldwell,* if we construe it the way the government suggests, not only throws the limitations' issue into a cockeyed hat, but it throws damages into a cockeyed hat as well.

The whole nature of the before and after, at least the way it was tried and presented for damages, was you had a piece of property that, but – for the taking, kind of sort of had a right to unencumbered use of all the property, including the surface.

Afterwards, you have the same situation, but [7] an easement has been taken, a new easement on the assumption that the old one was done because it would have been an abandonment. So the before and after is the property, with no encumbrance to the property with an easement of the type that was imposed.

What I am having a hard time visualizing is: Precisely what burden has been added to the property, in a before-and-after sense? I understand your position. You don't need to worry about this. If you are

right, that is just a problem for generations yet unborn to wrestle with.

But I am trying to sort of get my head wrapped around: Whether or not the Federal Circuit could have meant what you are saying it meant?

MS. TARDIFF: Well, in terms of the damages' inquiry, obviously, the Federal Circuit was looking strictly at the question of claim accrual. In that context, it talked about the difference between a permanent taking and a temporary taking, which would go to damages, obviously.

But I think the key point here is that when we do a damages' analysis in this case, you are right: In all takings cases, we kind of take this before-and-after the taking approach to assessing damages. And for these rails-to-trails cases, what we do is: In the

* * *

WISCONSIN CENTRAL LTD. – ABANDONMENT EXEMPTION – IN POLK COUNTY, WI

STB Docket No. AB-303 (Sub-No. 18X)

SURFACE TRANSPORTATION BOARD

1998 STB LEXIS 91

SERVICE DATE: March 13, 1998

March 9, 1998

PANEL:

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

OPINION:

By petition filed November 24, 1997,[1] Wisconsin Central Ltd. (WCL) seeks an exemption under *49 U.S.C. 10502* from the prior approval requirements of *49 U.S.C. 10903* to abandon a line of railroad known as the Dresser-Amery Line, between milepost 47.83 in Dresser and milepost 63.08 in Amery, a distance of 15.25 miles, in Polk County, WI. The United Transportation Union (UTU) requests imposition of labor protective conditions. In addition, the Wisconsin Department of Transportation (WisDOT),[2] on behalf

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[1] Notice of the filing was served and published in the Federal Register on December 12, 1997 (62 *FR 63602*).

[2] WisDOT is the designated state agency for rail matters in the State of Wisconsin. It is responsible for all highway and airport construction within the state and has the statutory right to acquire for present or future transportation, recreational or

(Continued on following page)

of the Wisconsin Department of Natural Resources (WisDNR),[3] requests issuance of a notice of interim trail use (NITU). We will grant the exemption, subject to trail use, environmental and standard employee protective conditions.

BACKGROUND

WCL, a Class II rail carrier and wholly owned subsidiary of Wisconsin Central Transportation Corporation, owns and operates approximately 2,000 miles of rail lines in four upper midwestern states. WCL states that the only shipper on the line, Amery Equity Co-op (Equity), is pursuing plans to relocate its operations from Amery to Cylon, WI, which is on another WCL line, between Owen, WI, and Minneapolis, MN, that has a more frequent level of service. Accordingly, WCL submits that Equity will receive better service as a result of the relocation. WCL states that, after abandonment, the track and materials that are salvageable will be used for upgrading and maintaining its other active rail lines and the remaining material will be sold as scrap.

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scenic purposes any property used in operating a railroad that is abandoned in Wisconsin.

[3] WisDNR is the lead state agency responsible for designating, acquiring, developing, and maintaining a system of state trails for public use by equestrians, bicyclists, cross country skiers or hikers.

DISCUSSION AND CONCLUSIONS

Under *49 U.S.C. 10903*, a rail line may not be abandoned without our prior approval. Under *49 U.S.C. 10502*, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of *49 U.S.C. 10101*; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under *49 U.S.C. 10903* is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [*49 U.S.C. 10101*(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving WCL from the cost of maintaining a line that serves only one shipper that is relocating its facilities and by allowing WCL to use its assets more productively elsewhere on its system [*49 U.S.C. 10701*(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power because Equity, the only shipper on the line, will apparently receive better service from WCL at its

new location.[4] Nevertheless, to ensure that the shipper is informed of our action, we will require WCL to serve a copy of this decision on Equity within 5 days of the service date of this decision and certify to us that it has done so.

UTU requests the imposition of labor protective conditions. Under *49 U.S.C. 10502*(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions in *Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1997).*

WCL has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. Our Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment, and SEA served an environmental assessment (EA) on January 23, 1998. In the EA, SEA indicated that WisDNR has advised the Board and WCL of a known petroleum soil contamination site at the Amery Bulk Plant (Plant) in Amery

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[4] Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

located along the WCL right-of-way. Accordingly, SEA recommends, and we agree, that a condition be placed on any decision granting abandonment authority requiring WCL to consult with WisDNR in order to fulfill WCL's obligation in the clean up process at the Plant site, and any other contamination site involving the WCL right-of-way in this abandonment. This consultation will be required whether or not WCL plans to initiate any salvage activity and prior to any salvage activity.

SEA also indicated in the EA that the Wisconsin State Historic Preservation Officer (SHPO) had not completed a determination of historical significance for several WCL properties located on the right-of-way. Therefore, SEA recommended that a condition be imposed requiring WCL to retain its interest in and take no steps to alter the historic integrity of the right-of-way until completion of the section 106 process of the National Historic Preservation Act, *16 U.S.C. 470f.* However, subsequent to service of the EA, SEA received a letter from the SHPO indicating that there are no properties in the National Register of Historic Places located within the area of potential effect of the proposed abandonment. Accordingly, SEA now recommends, and we agree, that the historic preservation condition not be imposed.

No comments to the EA were filed by the February 20, 1998 due date. Based on SEA's recommendations, we conclude that the proposed abandonment, as conditioned, will not significantly affect either the

quality of the human environment or the conservation of energy resources.

SEA states that, following the lines's abandonment, the right-of-way may be suitable for other public uses under *49 U.S.C. 10905*. We note that no one has sought a public use condition, and none will be imposed.

WisDOT, on behalf of WisDNR requests issuance of a NITU under the National Trails System Act, *16 U.S.C. 1247*(d), for the right-of-way involved in this proceeding. Acquisition of the rail corridor would allow WisDNR to use the right-of-way for bicycle, pedestrian or other trail purposes. WisDNR has submitted a statement of willingness to assume financial responsibility for the right-of-way and acknowledged that the use of the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.24. By letter filed December 30, 1997, WCL states that it is willing to negotiate with WisDNR for interim trail use. The request complies with the requirements of 49 CFR 1152.29 and WCL is willing to enter into negotiations. Therefore, we will issue a NITU for the described line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, WCL may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail

purposes is subject to restoration for railroad purposes.

The parties should note that operation of the trail use procedures could be delayed or even foreclosed, by the financial assistance process under *49 U.S.C. 10904*. As stated in *Rail Abandonments – Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986)*, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under *49 U.S.C. 1152.27(c)(1)*, the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, trail use may proceed.

It is ordered:

1. The request for a NITU under *49 U.S.C. 1247*(d) is accepted.

2. Under *49 U.S.C. 10502*, we exempt from the prior approval requirements of *49 U.S.C. 10903* the abandonment of the above-described line, subject to the employee protective conditions in *Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979)*, and the condition that WCL consult with

WisDNR (whether or not WCL plans to initiate any salvage activity and prior to any salvage activity) in order to fulfill WCL's obligation in the clean up process at the Plant site, and any other contamination site involving the WCL right-of-way in this abandonment.

3. WCL must serve a copy of this decision on Equity within 5 days after the service date of this decision and certify to the Board that it has done so.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specific date.

7. If an agreement for interim trail use/rail banking is reached by the 180th day after service of

this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, WCL may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. An OFA under 49 CFR 1152.27(c)(1)[5] to allow rail service to continue must be received by the railroad and the Board by March 23, 1998, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with *49 U.S.C. 10904* and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by a $ 1,000 filing fee.[6] See 49 CFR 1002.2(f)(25).

9. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

10. Provided no OFA has been received, this exemption will be effective on April 12, 1998. Petitions to stay must be filed by March 30, 1998, and petitions to reopen must be filed by April 7, 1998.

11. Pursuant to the provisions of 49 CFR 1152.29(e)(2), WCL shall file a notice of consummation

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[5] See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under *49 U.S.C. 10903*, STB Ex Parte No. 537 (STB served Dec. 24, 1996, and June 27, 1997).

[6] The fee will increase from $ 900 to $ 1,000 as of March 20, 1998.

with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by WCL's filing of a notice of consummation by March 13, 1999, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier

By the Board, Chairman Morgan and Vice Chairman Owen.

WISCONSIN CENTRAL LTD. – ABANDONMENT EXEMPTION – IN POLK COUNTY, WI

STB Docket No. AB-303 (Sub-No. 18X)

SURFACE TRANSPORTATION BOARD

2008 STB LEXIS 379

SERVICE DATE: July 15, 2008

July 14, 2008

PANEL:

DECISION

OPINION BY: By the Board, David M. Konschnik, Director, Office of Proceedings.

OPINION:

By decision and notice of interim trail use or abandonment (NITU) served on March 13, 1998, a 180-day period was authorized for the Wisconsin Department of Natural Resources (WisDNR) to negotiate an interim trail use/rail banking agreement with Wisconsin Central Ltd. (WCL) for a 15.25-mile line of railroad known as the Dresser-Amery Line between milepost 47.83 in Dresser and milepost 63.08 in Amery, Polk County, WI. Through a series of decisions, the negotiating period was extended through January 30, 2006.

On January 18, 2006, WisDNR[1] and Polk County (Petitioners) jointly filed a petition for an extension of the negotiating period for 180 days. WCL filed a response agreeing to the extension request. Petitioners stated that WCL had sold the portion of the line between milepost 49.6 and milepost 63.08 (presumably for use as a trail), but that the parties were still negotiating on the portion between milepost 47.83 and milepost 49.6, and more time was needed to finalize negotiations. Accordingly, the negotiating period for that portion of the line was extended until July 29, 2006. The negotiating period for that portion of the line was further extended through July 18, 2008, by decisions served on July 28, 2006, January 24, 2007, July 24, 2007, and February 4, 2008.

On July 2, 2008, WDOT, on behalf of Petitioners, filed a petition for an extension of the negotiating period for the remaining portion of the line for 180 days. Petitioners state that the parties are still negotiating and more time is needed to finalize negotiations. WCL filed a response agreeing to the extension request.

Where, as here, the carrier has not consummated the abandonment at the end of the previously imposed negotiating period and is willing to continue trail use negotiations, the Board retains jurisdiction,

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[1] The Wisconsin Department of Transportation (WDOT) filed on behalf of WisDNR.

and the NITU negotiating period may be extended.[2] Under the circumstances, further extension of the negotiating period is warranted. See *Birt v. STB*, 90 F.3d 580, 588-90 (D.C. Cir. 1996); *Grantwood Village v. Missouri Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996). Accordingly, the NITU negotiating period will be extended for that portion of the line between milepost 47.83 and milepost 49.6 for a period of 180 days from July 18, 2008 (until January 14, 2009). Given the time that has elapsed since abandonment was authorized, the parties are again urged to conclude their negotiations so that further extensions are not necessary.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioners' request to extend the NITU negotiating period is granted.

2. The NITU negotiating period is extended for that portion of the line between milepost 47.83 and milepost 49.6 until January 14, 2009.

3. This decision is effective on the date of service.

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[2] See *Rail Abandonments — Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 157-58 (1987).

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan

Acting Secretary

[LOGO]

Surface Transportation Board
FY 1998/1999/2000/2001 Report

Surface Transportation Board
Washington, DC 20423

September 20, 2002

To the Congress of the United States:

It is my pleasure to submit the second report of the Surface Transportation Board (Board). This report covers the Board's activities from October 1, 1997, through September 30, 2001. It follows the same basic format as the last report, except that the significant Board actions are included by subject matter in the appropriate places in the body of the report rather than presented separately in an appendix. The statement of appropriations and aggregate expenditures for fiscal years 1998 through 2001 appears in Appendix B.

Since the last report, the Board's composition has changed, with the departure of former Vice Chairman Gus A. Owen and the addition of now Vice Chairman Wayne O. Burkes and Commissioner William Clyburn, Jr. (who has since also departed). Additionally, I was sworn in for a second term on December 1, 1999.

Linda J. Morgan
Chairman

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RAILROAD RESTRUCTURING

- Declared void certain property-interest transfers by Railroad Ventures, Inc. to uphold the integrity of its rail line in connection with the forced sale of the line to Columbiana County Port Authority to allow continued rail service, in *Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, In Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) et al. (STB served Oct. 4, 2000), *clarified* (STB served Dec. 7, 2000), *admin. stay denied* (STB served Nov. 2, 2000), *further clarified* (STB served Nov. 9, 2001), *aff'd sub nom. Railroad Ventures, Inc. v. Surface Transportation Board*, Nos. 004303 et al. (6th Cir. Aug. 1, 2002).

Feeder Line Development Program. Under 49 U.S.C. 10907, when a line has been designated in a carrier's system diagram map as a candidate for abandonment or when service is inadequate for a majority of shippers who transport traffic over the

line, the Board can compel a railroad to sell the line to a party who will provide service. See 49 CFR 1151.

No applications were filed under this program during FY 1998-2001. However, acting on an application filed with the ICC prior to the ICCTA, the Board ordered one line sold under the feeder line development program – the 52-mile Norman Branch line in Arkansas – in *Caddo Antoine and Little Missouri Railroad Company – Feeder Line Acquisition – Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR*, Finance Docket No. 32479 (STB served Aug. 12, 1999), *modified* (STB served May 5, 2000), *aff'd sub nom. GS Roofing Products Co. v. Surface Transportation Board*, 262 F.3d 767 (8th Cir. 2001).

Trail-Use/Railbanking Program. The Board has a ministerial role in administering the railbanking program under the National Trails System Act Amendments of 1983, 16 U.S.C. 1247(d). See 49 CFR 1152.29. This law allows railroad rights-of-way that have been approved for abandonment to be preserved for possible future restoration of rail service and to be used in the interim as recreational trails. To preserve the right-of-way for potential future reactivation of rail service, the right-of-way remains under the jurisdiction of the Board during the interim trail use, and reversionary property interests in the right-of-way cannot vest.

The Board's docket and handling of trail-use requests are summarized in the following table.

Railbanking/Interim Trail Use						
Fiscal Year	Requests		Grants		Denials	
	Number	Miles	Number	Miles	Number	Miles
1996	49	1,118	39	788	6	309
1997	60	919	36	430	18	239
1998	59	1,081	42	746	12	188
1999	50	1,221	30	574	1	296
2000	29	600	17	442	1	31
2001	45	868	32	445	7	50

* * *

[LOGO]

Surface Transportation Board
FY 2002-2004 Report

Surface Transportation Board
Washington, DC 20423

December 2005

To the Congress of the United States:

It is my pleasure to submit the third report of the Surface Transportation Board. This report covers the board's activities from October 1, 2001, through September 30, 2004. It follows the same basic format as the last report, with a statement of appropriations and aggregate expenditures for fiscal years 2002 through 2004 appearing in Appendix B.

The Board's composition has changed since the last report, with the departure of former Chairman Linda J. Morgan and former Board Member Wayne O. Burkes. I was appointed Chairman on November 26, 2002. New Board Member W. Douglas Buttrey was sworn in on May 28, 2004, followed by Francis P. Mulvey, on June 2, 2004.

/s/ Roger Nober
Roger Nober
Chairman

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* * *

RAILROAD RESTRUCTURING

In another case, the STB authorized the Town of North Judson, IN, to purchase a line under the OFA provisions, in *CSX Transportation, Inc. – Abandonment Exemption – in LaPorte, Porter and Starke Counties, IN,* STB Docket No. AB-55 (Sub-No. 643X) (STB served May 14, 2004).

Feeder Line Development Program.

Under 49 U.S.C. 10907, when a line has been designated in a carrier's system diagram map as a candidate for abandonment or when service is inadequate for a majority of shippers who transport traffic over the line, the STB can compel a railroad to sell the line to a party who will provide service. See 49 CFR 1151.

One such "feeder-line" proceeding was instituted during FY 2002-2004 in *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL,* STB Finance Docket No. 34335. It followed a petition to revoke a class exemption for the acquisition of the operating easement and other assets of the 71.5-mile La Harpe line in Illinois. The STB accepted the petitioner's argument that the acquisition was intended to result in the abandonment and salvage of the line and directed that the line be reconveyed to the seller in *SF&L Railway, Inc. Acquisition and Operation Exemption - Toledo,*

Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 *et al.* (STB served Oct. 17, 2002), *clarified* (STB served Jan. 31, 2003). The petitioner's subsequent feeder line application to acquire the La Harpe line and 4.5 miles of additional line was granted in a decision issued on October 28, 2004.

Trail Use/Railbanking Program.

The STB has a ministerial role in administering the railbanking program under the National Trails System Act Amendments of 1983, 16 U.S.C. 1247(d) (Trails Act). See 49 CFR 1152.29. This law allows railroad rights-of-way that have been approved for abandonment to be preserved for possible future restoration of rail service and to be used in the interim as recreational trails. To preserve the right-of-way for potential future reactivation of rail service, when a railroad and a trail sponsor agree to negotiate for interim trail use, the STB issues a Certificate of Interim Trail Use (CITU) or a Notice of Interim Trail Use (NITU); if a trail arrangement is reached, the right-of-way remains under the jurisdiction of the STB during the interim trail use, and reversionary property interests in the right-of-way cannot vest.

The STB's docket and handling of trail-use requests are summarized in the following table.

Railbanking/Interim Trail Use						
Fiscal Year	Requests		Grants		Denials	
	Number	Miles	Number	Miles	Number	Miles
2002	39	467	21	141	2	34
2003	41	333	38	233	2	11
2004	37	476	42	606	12	34

Among the more significant actions taken in this area in FY 2002-2004, the STB:

- Reopened a proceeding to vacate a CITU and to authorize the replacement trail sponsor, in *St. Louis Southwestern Railway Co. – Abandonment Exemption – in Smith and Cherokee Counties, TX,* STB Docket No. AB-39 (Sub-No. 12) (STB served Mar. 12, 2002);

- Vacated a NITU held by a trail sponsor after the railroad was permitted to reactivate rail service over a rail-banked line, and determined that the Trails Act did not entitle a trail user to compensation when a carrier reactivates service, in *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc. – Abandonment and Discontinuance Exemption – between Albany and Dawson, in Terrell, Lee, and Dougherty Counties, GA,* AB-389 (Sub-No. 1X) (served May 16, 2003), *reconsid. denied* (STB served Feb. 2, 2004); and

- Denied a request to require either the railroad or trail sponsor to post a performance bond or to escrow funds for potential removal or cleanup costs for rail property that will be rail-banked and used in the interim as a trail, in *A & R Line, Inc. Abandonment – Exemption – in Cass and Pulaski Counties, IN,* STB Docket No. AB-855 (Sub-No. 1X) (STB served Aug. 13, 2004).

* * *

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

No. 08-852

In the Supreme Court of the United States

SARAH ILLIG AND GALE ILLIG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' claim for just compensation in connection with the preservation of a railroad right-of-way and its interim use as a recreational trail was time-barred under 28 U.S.C. 2501, because the claim was filed more than six years after the date on which the Interstate Commerce Commission issued a Notice of Interim Trail Use or Abandonment.

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In the Supreme Court of the United States

No. 08-852

SARAH ILLIG AND GALE ILLIG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 274 Fed. Appx. 883. The opinion of the United States Court of Federal Claims (Pet. App. 5a-29a) is reported at 67 Fed. Cl. 47.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2008. A petition for rehearing was denied on October 1, 2008 (Pet. App. 112a-113a). The petition for a writ of certiorari was filed on December 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under federal law, the Surface Transportation Board (STB), the successor agency to the Interstate Commerce Commission (ICC),[1] has exclusive and plenary authority over the construction, operation, and abandonment of virtually all of the Nation's rail lines. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). A rail carrier providing transportation service subject to the STB's jurisdiction may not abandon or discontinue service on any part of its railroad lines without the STB's express consent. *Id.* at 320; 49 U.S.C. 10903(a)(1).

In 1976, concerned about the loss of railroad trackage nationwide, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31, in part to promote the public use, including recreational use, of rail lines that would otherwise be abandoned. See *Preseault* v. *ICC*, 494 U.S. 1, 5 (1990) (*Preseault I*). The 4-R Act authorized the ICC to delay disposition of rail lines subject to abandonment for a period of time to allow for the sale of the line for public purposes. *Id.* at 6; see 4-R Act § 809(b) and (c), 90 Stat. 145.

Congress later found that the 4-R Act had not been successful in preserving railroad rights-of-way. *Preseault I*, 494 U.S. at 5. In 1983, Congress enacted the National Trails System Act Amendments of 1983 (Trails Act), Pub. L. No. 98-11, Tit. II, 97 Stat. 42, "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corri-

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[1] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 701 *et seq.*), Congress abolished the ICC and replaced it with the STB. See 49 U.S.C. 702.

dors, and to encourage energy efficient transportation use," as well as to promote the development of recreational trails. *Preseault I*, 494 U.S. at 17-18 (internal quotation marks and citations omitted); see 16 U.S.C. 1247(d). Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), provides an alternative to regulatory abandonment, commonly known as "railbanking." Under Section 1247(d), the STB retains jurisdiction so that the corridor may be returned to railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a state or local government or qualified private organization, allowing its use in the interim as a recreational trail. See *Preseault I*, 494 U.S. at 6-7. Section 1247(d) provides that "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. 1247(d).

A railroad corridor may be railbanked when the rail carrier files either an abandonment application under 49 U.S.C. 10903 or seeks an exemption from that provision under 49 U.S.C. 10502 (previously 49 U.S.C. 10505 (1994)). Section 10903(d) allows the STB to authorize abandonment or discontinuance if the Board finds that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." Section 10502 allows the STB to exempt a rail carrier from the requirements of Section 10903 and other statutory provisions upon a showing that (1) the statutory requirement in question is "not necessary to carry out [general] transportation policy" under 49 U.S.C. 10101, and (2) the service being exempted is "of limited scope" or the statutory requirement is "not needed to protect

shippers from the abuse of market power." 49 U.S.C. 10502(a).

When a rail carrier has filed an abandonment application or request for an exemption, a party interested in acquiring or using the right-of-way for interim trail use may file a request or petition that includes: (1) a map and description of the right-of-way, or portion thereof, that the party proposes to acquire or use; (2) a statement of willingness to assume full responsibility for the right-of-way, including management, legal liability, and payment of taxes; and (3) an acknowledgment that interim trail use is subject to the "possible future reconstruction and reactivation of the right-of-way for rail service." 49 C.F.R. 1152.29(a).

In exemption proceedings, if the STB receives a complete railbanking request or petition and if the railroad agrees to negotiate, then the STB issues a Notice of Interim Trail Use or Abandonment (NITU). 49 C.F.R. 1152.29(d)(1).[2] The NITU allows the rail carrier to discontinue service and salvage the track, but delays the effective date of the abandonment of the rail line for 180 days to allow the rail carrier and the trail operator time to negotiate a railbanking and interim trail use agreement. *Ibid.* If the parties do not reach an agreement within the time allowed, then the railroad may "fully abandon the line" and terminate STB jurisdiction by filing a notice with the STB. 49 C.F.R. 1152.29(d)(1) and (e)(2). On the other hand, if the parties reach an agreement, the NITU authorizes the interim trail user to take over management of the right-of-way, subject only to the right of a rail carrier to reassert control over the

[2] In abandonment application proceedings, the STB issues a Certificate of Interim Trail Use or CITU. 49 C.F.R. 1152.29(b)(1)(ii). There is no substantive difference between a NITU and a CITU.

property to restore rail service. 49 C.F.R. 1152.29(d)(2); see *Preseault I*, 494 U.S. at 7 n.5 ("If agreement is reached, interim trail use is thereby authorized."). Once an agreement is reached, interim trail use continues until the STB vacates all or part of the NITU to (1) permit the reactivation of service, or (2) reinstate the exemption, thereby permitting full abandonment under federal law. 49 C.F.R. 1152.29(d)(2) and (3).

2. Petitioners own land in which the Missouri Pacific Railroad (MoPac) held a right-of-way for railroad purposes. Pet. App. 7a. On February 7, 1992, MoPac sought the ICC's authorization to abandon a 6.2-mile segment of rail line, portions of which pass over petitioners' land. *Ibid.*

On March 25, 1992, the ICC issued a NITU authorizing MoPac and a private trail operator to negotiate an interim trail use agreement. Pet. App. 48a-51a; see *id.* at 8a. The ICC extended the NITU until December 31, 1992. On December 30, 1992, MoPac and the trail operator finalized a trail use agreement, under which the trail operator assumed all economic and legal responsibility for maintaining the trail, and MoPac reserved a right of reentry for purposes of reactivating rail service. MoPac then executed a quitclaim deed transferring its interest in the right-of-way to the trail operator. *Id.* at 8a, 43a-44a.

In 1997, MoPac requested that the ICC reopen the proceeding and partially vacate the NITU, because MoPac needed to continue railroad operations over a .21-mile portion of the covered right-of-way. On April 18, 1997, the ICC issued a decision reopening the proceeding and vacating the NITU with respect to that segment. Pet. App. 9a.

3. a. On December 28, 1998, petitioners filed a class action complaint in the United States Court of Federal Claims (CFC), in which they alleged that their property was taken by operation of the Trails Act when it "pre-empted [their] rights to * * * property which they enjoy under state law." Compl. ¶ 16. Petitioners sought compensation for the alleged taking of their property under the Tucker Act, 28 U.S.C. 1491(a). Compl. ¶¶ 18-21; see Pet. App. 9a.

The government moved to dismiss the complaint on the ground that it was time-barred under 28 U.S.C. 2501, since it was filed more than six years after issuance of the NITU. Pet. App. 9a-10a; see 28 U.S.C. 2501 (establishing a six-year statute of limitations for claims over which the CFC has jurisdiction). The court initially denied the motion to dismiss. Pet. App. 42a-47a. The court held that the claim accrued on December 30, 1992, when MoPac finalized a trail use agreement with the trail operator, and the complaint was therefore timely. *Id.* at 46a.

In 2004, while this case was still pending, the Federal Circuit issued its decision in *Caldwell* v. *United States*, 391 F.3d 1226, cert. denied, 546 U.S. 826 (2005). In *Caldwell*, the Federal Circuit held that a Fifth Amendment takings claim under the Trails Act accrues when the STB "issues an NITU that operates to preclude abandonment under section [1247(d)]," and thereby "preclude[s] the vesting of state law reversionary interests in the right-of-way." *Id.* at 1233-1234.

After *Caldwell* was decided, the government renewed its motion to dismiss petitioners' complaint. The CFC granted the renewed motion. Pet. App. 5a-29a. The CFC held that "*Caldwell* imposes a new, blanket rule that the accrual of *any* takings claim under the Trails

Act is the issuance date of the NITU," *id.* at 19a, and that the statute of limitations therefore expired six years after the ICC issued the NITU on March 25, 1992, rendering plaintiffs' December 28, 1998 complaint untimely, *id.* at 28a-29a. The CFC further held that, because the complaint was untimely, it lacked jurisdiction. *Id.* at 22a-28a.

b. The court of appeals summarily affirmed. Pet. App. 1a-4a.

ARGUMENT

Petitioners renew their contention (Pet. 16-31) that the CFC erred in dismissing their takings claim as untimely under 28 U.S.C. 2501. The courts below correctly held that petitioners' claim was untimely because it was filed more than six years after the ICC issued a NITU, which authorized interim trail use and delayed abandonment of the railroad easement while the rail carrier and a trail operator negotiated a final interim trail use agreement. This Court has recently denied certiorari in two other cases raising the same contention. *Barclay* v. *United States*, 549 U.S. 1209 (2007); *Caldwell* v. *United States*, 546 U.S. 826 (2005). Further review in this case is likewise unwarranted.

1. a. In *Preseault* v. *ICC*, 494 U.S. 1 (1990), this Court rejected a challenge to the Trails Act on the ground that it violates the Fifth Amendment's prohibition against the taking of property without just compensation. *Id.* at 4-5. Without deciding whether the Trails Act effected a taking of property in that case, the Court held that the statute does not violate the Just Compensation Clause because it does not forbid claimants from

seeking just compensation under the Tucker Act, 28 U.S.C. 1491(a). *Preseault I*, 494 U.S. at 11-17.[3]

The petitioners in *Preseault I* subsequently filed a Tucker Act suit. By a divided vote, the en banc Federal Circuit answered the takings question this Court had declined to answer in *Preseault I*. *Preseault* v. *United States*, 100 F.3d 1525 (1996) (*Preseault II*). The plurality held that a Fifth Amendment taking occurs under the Trails Act when the Act precludes the abandonment and extinguishment of a railroad easement under state law, and thus prevents any state-law reversionary interests from vesting in a property owner. *Id.* at 1550-1551, 1552.[4]

In *Caldwell* v. *United States*, 391 F.3d 1226 (2004), cert. denied, 546 U.S. 826 (2005), the Federal Circuit held that such a claim accrues when "the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under [16

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[3] As petitioners note (Pet. 17-18), the *Preseault I* Court stated that the Trails Act "prevent[s] property interests from reverting under state law," 494 U.S. at 8, and suggested in dicta that "some rail-to-trail conversions will amount to takings," *id.* at 16; see also *id.* at 16 & n.9 (providing examples of applications of the Trails Act that would not amount to takings). But the Court explicitly reserved the question whether a taking had in fact occurred, *id.* at 17, and did not further address the contours of a Trails Act takings claim.

[4] As the plurality noted in *Preseault II*, it is commonly said that interest in an easement "reverts" to a property owner upon termination of the easement, although it would be more accurate to say that, when the easement is extinguished, the interest in the easement "vest[s]" in the property owner. See 100 F.3d at 1533-1534. Consistent with common usage, however, this brief refers to a property owner's retained interest following conveyance of an easement as a "reversionary" interest.

U.S.C. 1247(d)]." *Id.* at 1233. The court concluded that it is at that moment that "state law reversion interests [are] forestalled by operation of Section 8(d) of the Trails Act." *Ibid.* The court explained that, under the procedures the STB now uses to implement the Trails Act, the NITU is "the only *government* action in the railbanking process that operates to prevent abandonment" and any resulting state-law reversion of the right-of-way, since the STB plays no role in finalizing the trail use agreement. *Ibid.*

The court held in *Caldwell* that, although issuance of a NITU does not inexorably lead to interim trail use, it nevertheless marks the beginning of a federal-law preclusion of state-law reversionary rights. The court explained:

> [T]he NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

391 F.3d at 1234 (citations and footnotes omitted).

b. Consistent with *Preseault II*, petitioners in this case alleged in their complaint that their property interest in a former railroad right-of-way was taken when the Trails Act prevented the vesting of the "rights to th[eir] property which they enjoy under state law." Compl. ¶ 16. The court in this case correctly concluded that peti-

tioners' claim accrued, and the statute of limitations began to run, when the ICC issued the NITU on March 25, 1992. See Pet. 3a-4a.

As the court explained in *Caldwell*, when the ICC issued the NITU, it simultaneously authorized railbanking and interim trail use, and delayed consummation of abandonment under federal law pending negotiations between the rail carrier and the trail operator. At that point, the ICC's involvement in the disposition of the railroad easement was at its end; no further approval would be required for the trail operator to commence interim trail use. Issuance of the NITU thus marked the moment at which federal law (1) at least temporarily forestalled the vesting of any state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement. See *Caldwell*, 391 F.3d at 1233-1234.

Petitioners' claim, which was filed more than six years after Section 1247(d) first operated to preclude the reversion of their state-law interests in the former railroad right-of-way, was untimely under 28 U.S.C. 2501.

2. Although petitioners argue at length (Pet. 19-23) that the court of appeals erred in attributing any significance to the issuance of the NITU, they ultimately acknowledge that, "[i]f the easement would otherwise have been abandoned (by means other than conversion to interim trail use) before or during" the period in which the NITU is in effect, "the NITU might effect a taking for the duration of the negotiations." Pet. 27.[7] Petitioners

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[7] Petitioners do not dispute that, in this case, "the easement would otherwise have been abandoned" under state law "before or during" the

contend, however, that they are seeking compensation for a *different* taking of their property: a *permanent* taking that, in their view, commenced approximately six years before they filed their complaint in this case. Pet. 27-28. Petitioners' contention is incorrect.

As petitioners elsewhere make clear, their claim rests on the proposition that "the Trails Act effects a taking when it prevents an abandoned railroad easement from reverting under state law to the owner of the servient estate." Pet. 17.[6] To be sure, under federal

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period in which the NITU was in effect. See Pet. 27. They note, however, that in some cases, reversion does not occur under state law until after federal authorization of abandonment. But contrary to petitioners' argument, even in those cases, a NITU effectively delays state-law reversion by authorizing federal-law abandonment, but only after 180 days, and only if no interim trail use agreement is reached. See 49 C.F.R. 1152.29(c)(1) and (d)(1).

[6] To the extent petitioners contend that a Trails Act takings claim should be conceptualized not as the blocking of reversionary interests but as the subsequent physical invasion of the easement by the public, see Pet. 28 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), that contention does not find support in this Court's cases. Although the Court in *Preseault I* reserved the question whether operation of the Trails Act necessarily results in *any* compensable taking, see 494 U.S. at 17, to the extent that it identified a potential takings question, that question concerned the blocking of reversionary interests, see *id.* at 8.

Moreover, unless the STB has already authorized abandonment under federal law, a railroad easement remains subject to the exclusive and plenary authority of the STB. Unlike the usual physical invasion case, the landowner in a Trails Act takings case is already deprived of possession and control over the property; the decision to authorize interim trail use of a railroad right-of-way, subject to later reactivation of rail use, represents a change in the set of applicable regulatory conditions, but it does not result in a new deprivation of possession and control. In any event, this case would not be an appropriate vehicle for consideration of broader questions concerning the nature and scope of

law, land subject to a railroad easement may not revert to the adjacent property owner while the easement is actually being used as a recreational trail. 16 U.S.C. 1247(d). But, as petitioners appear to recognize (Pet. 27), by the time a trail use agreement is signed, federal law has *already* forestalled any such reversion. As the Federal Circuit has explained, a NITU stands as a "barrier to reversion" so long as it is in effect. *Barclay* v. *United States*, 443 F.3d 1368, 1374 (2006), cert. denied, 549 U.S. 1209 (2007).

Petitioners contend that any taking that commences upon issuance of the NITU is "temporary at the outset," and that their takings claim should not accrue until the taking is "transformed into a permanent interference." Pet. 31 n.4. The court of appeals has correctly rejected that contention. See *Caldwell*, 391 F.3d at 1235. As the court explained, under the current regulations implementing the Trails Act, "issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *Id.* at 1233-1234. To the extent the government's action results in a taking of property, it is a "single taking," *id.* at 1235, of a "single reversionary interest," *Barclay*, 443 F.3d at 1378.

The issuance of the NITU thus "marks the 'finite start' to either temporary or permanent takings claims." *Caldwell*, 391 F.3d at 1235. When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference

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Fifth Amendment liability under the Trails Act. The course of litigation in this case has narrowed the issues to the question when the statute of limitations begins to run on a claim that the Trails Act has blocked the vesting of state-law property interests. See Pet. App. 1a-4a; cf. Pet. i.

with reversionary interests, and any takings claim premised on such interference therefore accrues on that date. *John R. Sand & Gravel Co.* v. *United States*, 457 F.3d 1345, 1355-1356 (Fed. Cir. 2006), aff'd, 128 S. Ct. 750 (2008) (internal quotation marks and citations omitted). The fact that any taking resulting from the interference may later prove to have been temporary is irrelevant; as the court of appeals has explained, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues." *Caldwell*, 391 F.3d at 1234.

Finally, accepting the proposition that the NITU marks the "finite start" of their claim based on the preclusion of reversionary interests, petitioners contend that the preclusion does not "stabilize[ ]," and the claim thus does not accrue, until the rail carrier and the trail operator enter into a trail use agreement. Pet. 31. Petitioners rely for that contention on *United States* v. *Dickinson*, 331 U.S. 745 (1947), in which the Court held that the statute of limitations did not bar a claim for a taking of property by gradual flooding "when it was uncertain at what stage in the flooding operation the land had become appropriated to public use." *United States* v. *Dow*, 357 U.S. 17, 27 (1958). In this case, however, petitioners do not dispute that the preclusion of reversionary interests on which their takings claim rests occurred immediately upon issuance of the NITU, rather than gradually, as in *Dickinson*. That it may not have been clear at the outset whether the preclusion was indefinite or merely temporary does not change the fact that the NITU marked the "finite start" to the preclusion. *Caldwell*, 391 F.3d at 1235.

3. Petitioners (Pet. 32) contend that this Court's review is warranted to resolve a conflict with *National*

Ass'n of Reversionary Property Owners v. *Surface Transportation Board*, 158 F.3d 135 (D.C. Cir. 1998), in which the court stated that "[b]ut for the negotiation of a trail use agreement, state property law would be revived and, possibly, trigger the extinguishment of rights-of-way and the vesting of reversionary interests." *Id.* at 139. As petitioners themselves note (Pet. 32), *National Ass'n of Reversionary Property Owners* concerned a challenge to the denial of a request for rulemaking; the accrual date of a takings claim was not at issue. In any event, the District of Columbia Circuit's statement is not inconsistent with *Caldwell*, which held that a "permanent taking" may be consummated once "a trail use agreement is reached and abandonment of the right-of-way is effectively blocked," 391 F.3d at 1234 (citing *Preseault II*, 100 F.3d at 1552), but emphasized that issuance of the NITU is the event that "trigger[s that] process," *ibid.*

Petitioners also err in contending (Pet. 32-33) that the *Caldwell* rule conflicts with earlier decisions of the Federal Circuit. As the *Caldwell* court itself noted, no earlier Federal Circuit decision had ever addressed the question when a Trails Act takings claim accrues. 391 F.3d at 1228 ("This case requires us, for the first time, to determine when the Fifth Amendment takings claim accrues for purposes of the six-year statute of limitations under the Tucker Act.") (citations omitted). The Federal Circuit has consistently adhered to *Caldwell*'s conclusion that a takings claim under *Preseault II* accrues when the NITU is issued. See *Barclay*, *supra*; Pet. App. 1a-4a.[7]

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[7] Petitioners rely (Pet. 32-33) on language in *Preseault II* and other Federal Circuit opinions suggesting that "the establishment of the rec-

In any event, even if there were an intra-circuit conflict between later and earlier cases on this issue, it would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners claim that any intra-circuit conflict in this area is "uniquely important" because the Federal Circuit has "exclusive appellate jurisdiction over takings claims against the federal government." Pet. 33 n.5. But as *Caldwell* and Federal Circuit cases following it (including this case) make clear, the Federal Circuit now consistently applies the *Caldwell* rule. There thus is now clear precedent for trial courts to follow in Trails Act cases under the Tucker Act, and landowners have a clear and simple rule for determining when a just compensation claim accrues.

4. Finally, petitioners err in suggesting (Pet. 35-37) that the decision below has important practical consequences that warrant this Court's intervention.

Although petitioners repeatedly criticize (Pet. 19, 35) the court of appeals for adopting a "one-size-fits-all 'bright-line rule,'" that bright-line rule has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires. See *Barclay*, 443 F.3d at 1378. Notably,

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reational trail" results in a taking of property under the Fifth Amendment. *Presault II*, 100 F.3d at 1531 (plurality opinion); see also *Hash* v. *United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005); *Toews* v. *United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004). *Presault II*, however, held that a taking occurred when the Trails Act operated to prevent a property owner's interests in a railroad right-of-way from reverting to the owner in accordance with state law. 100 F.3d at 1550-1551, 1552; see *Caldwell*, 391 F.3d at 1233. The court in *Presault II* had no occasion to consider whether the preclusion of reversionary interests occurred simultaneously with "the establishment of the recreational trail," or upon issuance of a NITU.

the government is not aware of any currently pending case that is subject to dismissal under *Caldwell*.[8]

Petitioners also err (Pet. 36) in predicting that the *Caldwell* rule will lead to a proliferation of unnecessary litigation. In this case, the difference between the accrual date identified by the court of appeals and the accrual date petitioners urge is a matter of months; and in most cases, the difference between the two dates will not meaningfully alter property owners' litigation incentives. It is true that, under *Caldwell*, landowners may seek compensation for an alleged taking immediately upon issuance of the NITU, even though no trail use agreement is reached, and any taking that may later be found would only have been temporary. But a landowner has six years within which to file suit, which is ample time for the landowner to know whether an agreement was reached before filing suit. Moreover, the prospect of the litigation petitioners hypothesize is hardly unique to the Trails Act context. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334-335 (2002). And this Court has made clear that such allegations "require[] careful examination and weighing of all of the relevant circumstances," *id.* at 335 (internal quotation marks and citation omitted), with due regard for the principle that not "every delay in the use of prop-

[8] The government is, however, aware of one case pending in the Federal Circuit in which the *Caldwell* rule is otherwise relevant. In *Fauvergue* v. *United States*, No. 2009-5048 (filed Feb. 26, 2009), the Federal Circuit is considering the question whether putative class members are allowed to opt in after the six-year statute of limitations has expired, when the class action complaint was filed before the expiration as to one plaintiff and was amended after expiration of the limitations period to add other plaintiffs as putative class members. A similar question is presented in other cases now pending before the United States Court of Federal Claims.

erty" will require compensation, *ibid.*; cf. *Caldwell*, 391 F.3d at 1234 n.7 (reserving the question whether "the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached").

Finally, there is no merit to petitioners' suggestion (Pet. 35) that the decision below raises justiciability questions that warrant further review. Petitioners acknowledge that a claim becomes ripe, and that a landowner has standing, when Section 1247(d) has "interfere[d] with the abandonment and reversion that would otherwise occur under state law." Pet. 35. For the reasons explained above, see pp. 8-10, *supra*, that interference begins on the date when the STB issues a NITU, which "halt[s] abandonment and the vesting of state law reversionary interests when issued." *Caldwell*, 391 F.3d at 1235. This Court has twice before denied review of that conclusion, in *Caldwell* and *Barclay*, and there is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

SARAH ILLIG and GALE ILLIG
(for themselves and as representatives
of a class of similarly situated persons),

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

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CORPORATE DISCLOSURE STATEMENT

Counsel certifies that only one petitioner is a corporation with a parent corporation or is a corporation ten percent or more of whose stock is owned by a publicly held corporation. Specifically, Albaca, Inc., is either the parent corporation of petitioner Sunset Memorial Park, Inc., or a publicly held company that owns ten percent or more of the stock of petitioner Sunset Memorial Park, Inc.

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ARGUMENT

The consequences of the Federal Circuit's error are substantial and reach not only takings claims arising under the Trails Act but all takings claims regardless of how they arise. The blanket rule invented by the Federal Circuit and promptly embraced by the government has pervasively frustrated the Court of Federal Claims' ability to resolve Trails Act takings claims in a predictable and efficient manner, and will continue to do so if allowed to stand.

I. The Decision Below Conflicts with This Court's Decisions and Is Erroneous

The government's position violates the most basic principle of takings law: a taking occurs only if a government act actually interferes with a property right. Petition for a Writ of Certiorari ("Pet.") 17-22. The government does not deny that principle, but asserts, "[P]etitioners do not dispute that the preclusion of reversionary interests on which their takings claim rests occurred immediately upon issuance of the NITU." Br. for the United States in Opp'n ("Opp.") 13. That is obviously incorrect. The core of petitioners' argument is that the interference for which they seek compensation did not occur, and could not have occurred, until MoPac's railroad easement was converted to trail use pursuant to the trail-use agreement. Not until then did 16 U.S.C. § 1247(d) preempt the abandonment of the easement that would have occurred under Missouri law as a

result of the conversion. Under the government's view, petitioners' takings claim accrued before the conversion and thus before the operation of section 1247(d) – which is to say, before a government act actually interfered with the particular property right for which petitioners seek compensation. That result violates not only basic takings law, but also the rules of standing and ripeness, and, as Judge Bruggink said, "throws [the question of] damages into a cockeyed hat." Pet. 21-22, 35-37; App. 126a-28a.

Ignoring most of petitioners' arguments, the government ultimately rests its defense of the decision below upon a single incorrect proposition: that the taking for which petitioners seek compensation occurred when the NITU issued because "issuance of the NITU is the event that 'trigger[s] [the] process'" by which "'a trail-use agreement is reached and abandonment of the right-of-way is effectively blocked.'" Opp. 14 (quoting *Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004)). The government's argument justifies neither the Federal Circuit's bright-line rule that a Trails Act takings claim accrues when the NITU issues, nor its application of that rule here.

A. Determining when petitioners' Trails Act takings claim accrued first requires identifying which government act interfered with which property interest. The Trails Act provides: "interim [trail] use shall not be treated, for purposes of any law or rule of

law, as an abandonment of the use of such rights-of-way for railroad purposes." § 1247(d). Thus section 1247(d) does not preempt state-law property interests until the railroad easement would be deemed "abandoned" under state law as a result of its conversion to interim trail use – as this Court has recognized. *Preseault v. ICC*, 494 U.S. 1, 8 (1990) ("By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law....") (citation omitted). And that does not occur until the railway and trail operator execute a trail-use agreement. *Id.* at 7 & n.5 ("If the parties reach agreement, the land may be transferred to the trail operator for interim trail use"). When section 1247(d) preempts the state-law abandonment that would occur upon the easement's conversion to trail use, it creates a new easement – one for trail use. But for the operation of section 1247(d), there would be no easement, only a trespass by the trail operator. The creation of an easement is a permanent physical occupation and therefore a *per se* taking of property. Pet. 28.[1]

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[1] Although, as the government notes, Opp. 7-8 & n.3, this Court did not decide in *Preseault* that a taking had actually occurred, the Court clearly concluded that a taking would occur if the railroad easement would terminate under applicable state law upon conversion to trail use but for the operation of section 1247(d). 494 U.S. at 8, 16. The *Preseault* Court declined to decide whether a taking had actually occurred because the

(Continued on following page)

That is petitioners' takings claim. What happens between issuance of the NITU and conversion of the railroad easement to trail use is irrelevant to that claim. Issuance of the NITU did not interfere with any property interest because, "[u]nder Missouri law, ... [petitioners'] land was still burdened by the railroad easement when the NITU was issued." *Illig v. United States*, 67 Fed. Cl. 47, 51 (2005).[2] Issuance of the NITU, therefore, cannot support the Federal Circuit's blanket rule or its ruling here.

But even if the NITU interfered with a property interest when issued, that interference would be irrelevant to petitioners' takings claim (and to all other Trails Act takings claims) because it would differ in at least two critical respects from the only interference for which petitioners seek compensation: (1) the NITU's interference would be temporary (lasting only for the duration of the negotiation period), whereas section 1247(d)'s interference is

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plaintiffs had not yet sought compensation under the Tucker Act. *Id.* at 11-17.

[2] The government asserts that petitioners "do not dispute that, in this case, 'the easement would otherwise have been abandoned' under state law 'before or during' the period in which the NITU was in effect." Opp. 10 n.5. That is not only an inaccurate description of the petition, but also contrary to the law of the case and contrary to decision of the Eighth Circuit in a case involving the same property and the same NITU as this case. *Grantwood Village v. MoPac*, 95 F.3d 654, 659 nn.5-6 (8th Cir. 1996) ("Even if we examine Missouri law, we nevertheless conclude that state law does not mandate a conclusion that the right-of-way has been abandoned" at the time the NITU issued.).

permanent; and (2) the NITU's interference would not create a right to use the land as a trail, whereas section 1247(d)'s interference would. Accordingly, the government is simply wrong when it asserts, "To the extent the government's action results in a taking of property, it is a 'single taking' of a 'single reversionary interest.'" Opp. 12 (quoting *Caldwell*, 391 F.3d at 1235, and *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006)) (citation omitted). For the two reasons just stated, section 1247(d) affects different property rights from those affected by the NITU (if any). *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002).[3]

B. Adopting the Federal Circuit's view, the government argues that petitioners' takings claim accrued when the NITU issued because "[i]ssuance of the NITU ... marked the moment at which federal law (1) at least temporarily, forestalled the vesting of any state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement." Opp. 10. Neither of these consequences of the NITU, however, suffices to effect the taking for which petitioners seek compensation.

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[3] The colloquial language of "blocking" the "reversion" might obscure these crucial differences between the effect of the NITU's issuance and the effect of section 1247(d)'s operation upon conversion of the railroad easement to trail use pursuant to the trail-use agreement.

The government's first point is both wrong and irrelevant for reasons just explained: the issuance of the NITU did not here and often would not, under applicable state law, interfere with any property right; and even if it did, that interference would be fundamentally and meaningfully different from the interference for which petitioners seek compensation.

The government's second point is self-defeating. Because when the NITU issues the indefinite preclusion of the reversion of the easement is, as the government admits, "contingent on the finalization of an interim trail use agreement," that preclusion, by definition, cannot yet have occurred. If the negotiation fails, the railroad easement is abandoned but not converted to trail use; thus, section 1247(d) never operates to preempt abandonment. Indeed, at one point the government says, "*Caldwell* ... held that a 'permanent taking' may be consummated once 'a trail use agreement is reached and abandonment of the right-of-way is effectively blocked.'" Opp. 14 (citation omitted) (quoting *Caldwell*, 391 F.3d at 1234). *Precisely*. If the permanent taking of a trail easement is not "consummated" until the trail-use agreement is executed, then it follows that the associated takings claims cannot accrue until then either. A government act is necessary but not sufficient to effect a "taking" of property; there must

also be an actual interference with property. Pet. 17, 24-25.[4]

C. Trying to blur the difference between the temporary taking that might occur upon issuance of the NITU and the permanent physical taking that occurs upon execution of the trail-use agreement, the government asserts: "Unlike the usual physical invasion case, the landowner in a Trails Act takings case is already deprived of possession and control over the property; the decision to authorize interim trail use of a railroad right-of-way, subject to later reactivation of rail use, represents a change in the set of applicable regulatory conditions, but it does not result in a new deprivation of possession and control." Opp. 11. Read literally, this statement might be true, particularly where, as here, the easement would not have terminated under state law when the NITU issued.

But the statement is certainly incorrect if the government means to suggest also that the only effect

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[4] Noting petitioners' citation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the government declares: "To the extent petitioners contend that a Trails Act takings claim should be conceptualized not as the blocking of reversionary interests but as the subsequent physical invasion of the easement by the public, that contention does not find support in this Court's cases." Opp. 11 n.6 (citation omitted). Petitioners do not so contend. *Loretto* shows that when the government conditions its interference on a subsequent private act, that interference does not occur, and thus the takings claim does not accrue, until that private act occurs. Pet. 25.

of section 1247(d) is to change applicable regulatory conditions. Section 1247(d) operates upon execution of the trail-use agreement to burden the land permanently with a trail easement. But for operation of section 1247(d), the land would be entirely unencumbered by an easement – the NITU-sanctioned negotiation would end, the railroad easement would be abandoned, and the property would revert to the underlying landowner.

The government also argues: "The fact that any taking may later prove to have been temporary is irrelevant; as the court of appeals has explained, 'it is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.'" Opp. 13 (quoting *Caldwell*, 391 F.3d at 1234) (brackets omitted). Indeed, petitioners have acknowledged that if a taking was initially permanent and then was cut short, the takings claim – whether for a permanent or temporary taking – might accrue at the time of the initial, ostensibly permanent interference. Pet. 31 n.4. But that is not how the Trails Act process works and not what happened here.

First, if the railroad easement would not have terminated under state law when the NITU issued, then the NITU's issuance might not interfere with a property right at all – temporarily or permanently. Second, even if the issuance of the NITU interfered with a property interest, that interference would differ fundamentally from the interference caused by section 1247(d) upon execution of the trail-use

agreement because only the latter interference creates an easement for trail use. And third, even if the NITU imposed the same burden upon the land as section 1247(d), the sequence would be the reverse of what the government described: an initially temporary interference would become permanent. Petitioners previously showed why a permanent takings claim does not accrue at the time of the initial, ostensibly temporary interference. Pet. 29-31.[5]

II. The Decision Below Conflicts with Other Appellate Decisions

The government denies that the Federal Circuit's ruling here conflicts with its ruling in several earlier cases or with the ruling in *National Ass'n of Reversionary Property Owners v. STB*, 158 F.3d 135 (D.C. Cir. 1998), arguing that in none of those cases did the court expressly "address[ ] the question when a Trails Act takings claim accrues." Opp. 13-15. But

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[5] The government says petitioners "accept[ed] the proposition that the NITU marks the 'finite start' of their claim based on the preclusion of reversionary interests." Opp. 13. On the contrary, petitioners obviously contend the interference for which they seek compensation did not occur until section 1247(d) operated upon execution of the trail-use agreement. Petitioners clearly accepted the government's proposition only *arguendo*: petitioners' "takings claim would be timely *even if* their *per se* physical takings claim accrued simultaneously with their putative temporary takings claim accrued." Pet. 31 (emphasis added).

the analysis in those decisions clearly conflicts with the Federal Circuit's ruling here. Pet. 31-34.

III. The Decision Below Has Created Significant Practical Problems

The government strains to downplay the significant, intractable practical problems created by the Federal Circuit's blanket rule. The government says it "is not aware of any currently pending case that is subject to dismissal under *Caldwell*." Opp. 16. Yet, the claims of fifteen plaintiffs in *Fauvergue v. United States* recently fell victim to *Caldwell*'s blanket rule. 86 Fed. Cl. 82, 85-86, 94 (2009).[6] Further, the effect of that rule is not limited to whether a claim is timely. It also affects who has standing (only the owner as of the date of the taking), the value of the property taken (calculated as of the date of the taking), and the amount of prejudgment interest (begins to accrue on the date of the taking). *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001);

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[6] There, a class complaint was filed within six years of the NITU's issuance. More than six years after issuance but less than six years after the trail-use agreement, fifteen members of the putative class moved to be joined as named plaintiffs. The court dismissed those claims because they were untimely under *Caldwell*, and, the court held, the limitations period for putative class members could not be tolled upon the filing of the class complaint in light of *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). The tolling question is now before the Federal Circuit, but its resolution will not affect the timeliness of the Illigs' complaint.

United States v. Dow, 357 U.S. 17, 22 (1958). These issues must be resolved in every Trails Act takings case. There are dozens of pending Trails Act cases involving hundreds of landowners. Just in the five months since this petition was filed, at least seventeen Trails Act takings complaints involving more than 120 landowners were filed in the Court of Federal Claims.[7]

The government contends that the "one-size-fits-all 'bright-line rule'" established in *Caldwell* and applied here "has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires." Opp. 15. That is incorrect. A blanket rule that all Trails Act takings occur at the time of the trail-use agreement would afford equal certainty to claimants but would also accord much better with established and fundamental principles of takings law and jurisdiction than the Federal Circuit's rule, thus avoiding the other problems discussed here.

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[7] *American Country Institute, Inc. v. United States*, No. 09-163; *Asmussen v. United States*, No. 09-129; *Buford v. United States*, No. 09-121; *Burgess v. United States*, No. 09-242; *Carolina Plating Works, Inc. v. United States*, No. 09-152; *Capreal v. United States*, No. 09-186; *Ericksen v. United States*, No. 09-22; *Geneva Rock Prods., Inc. v. United States*, No. 08-920; *Gregory v. United States*, No. 09-114; *Haggart v. United States*, No. 09-103; *Dana R. Hodges Trust v. United States*, No. 09-289; *Jenkins v. United States*, No. 09-241; *Longnecker Property v. United States*, No. 09-173; *Rasmuson v. United States*, No. 09-158; *Rhutasel v. United States*, No. 09-159; *Whispell v. United States*, No. 09-315; *Ybanez v. United States*, No. 09-172.

Indeed, the Federal Circuit's blanket rule has the singular *vice* of generating substantial confusion among claimants, the government, and the lower courts, which has increased even since the petition was filed. For example, in *Pankratz v. United States*, No. 07-675 (Fed. Cl.), the court is trying to apply the Federal Circuit's bright-line rule to a situation in which a NITU was issued and expired, and then a second NITU was issued to a different prospective trail operator, who reached a trail-use agreement with the railway. Although *Barclay* held that the "original" NITU initiated a "single and continuous government action," 443 F.3d at 1375, the government maintains that the *Pankratz* plaintiffs' takings claims accrued when the second NITU issued. Reply App. 2a-11a (Def.'s Mem. in Supp. of Its Cross-Mot. for S.J. and Opp'n to Pls.' Mots. for Partial S.J. 7-8, 12-16, *Biery v. United States*, No. 07-693, and *Pankratz* (Fed. Cl. June 2, 2008) (consolidated)).

And in *Ladd v. United States*, No. 07-271 (Fed. Cl.), the plaintiff brought a takings claim arising out of the issuance of a NITU even though a trail-use agreement has not been reached. Like petitioners, the government has argued there that the NITU standing alone did not "grant[ ] anyone the authority to enter the property" or otherwise result in a "physical occupation." Reply App. 15a (Tr. of Proceedings 58 (May 19, 2009)). Judge Hodges, echoing Judge Bruggink, lamented recently in *Ladd* that "the case law that's out there [is] sort of unhelpful in some respects or worse than unhelpful in fact" and had

"[m]uddled" the issues before him. Reply App. 13a-15a (Tr. of Proceedings 4, 38).

That this Court denied review of *Caldwell* and *Barclay* does not militate against reviewing the ruling here because, among other reasons, the intractable practical consequences of those decisions had not yet manifested.

CONCLUSION

For the reasons stated above and previously, the petition for a writ for certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

DOROTHY L. BIERY, et al., and JERRAMY PANKRATZ and ERIN PANKRATZ, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 1:07-cv-693 (consolidated with: Case No. 07-675L) Honorable Nancy B. Firestone (Filed June 2, 2008)

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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* * *

III. FACTUAL BACKGROUND

A. The Right-of-Way at Issue in *Pankratz*

The property at issue in *Pankratz* is a 10.6-mile right-of-way that extends between milepost 483.62 in Augusta, Kansas and milepost 494.22, near Andover, Kansas. The rail line was originally constructed by the St. Louis, Wichita & Western Railway Company ("SLW&W") and formed a part of the Oswego to Wichita line. Def. Ex. 3 at 3 (Historic Report). The railroad acquired its interests in the segments of this 10.6-mile right-of-way that are at issue in this case by means of two written instruments. The first is the condemnation instrument, which includes [7]

segments of the subject right-of-way that abut the lands allegedly owned by the six Plaintiffs.[9] *See* Def. Ex. 10 at ¶ 5 (Pankratz Straup Decl.); *id.*, Ex. 10-1) The second is a quitclaim deed by which the railroad acquired a portion of the right-of-way that abuts the property owned by Plaintiff Colling. *Id.*, Ex. 10-2.

Construction of this railroad began in 1879 and was completed by May 1880. Def. Ex. 3 (Historic Report). Through a series of railroad mergers, ownership of the subject right-of-way was transferred to the Burlington Northern Santa Fe Railway Company ("BNSF") in 1995. *Id.* In 2001, Butler County (the "County") acquired the railway line by donation from the BNSF. The County intended to rehabilitate the line and locate an operator in order to preserve the rail service in the area. *Id.* at 1. When the County was unable to locate an operator, it filed a Notice of Exemption under 49 C.F.R. § 1152.50 seeking authority to abandon the 10.6 miles of rail line. *See* Pankratz Pls.' Proposed Facts, Tab M. The exemption became effective on August 4, 2004, meaning that on that date, and absent any further orders from the STB, the County would be authorized to abandon the rail line. *Id.*

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[9] The named Pankratz Plaintiffs have indicated that they plan to file a motion for class certification but have not done so yet. Plaintiffs' motion for partial summary judgment is limited to the claims of the named Plaintiffs, as is this cross-motion.

Before the County exercised its authority to abandon the line, Prairie Travelers, Inc. ("PTI") expressed an interest in negotiating a railbanking and interim trail use agreement with the County. The County agreed to negotiate and, on September 14, 2004, the STB issued a NITU which provided a 180-day period during which the parties could negotiate a voluntary agreement. *Id.*, Tab C. However, Butler County and PTI were unable to reach such an agreement, the NITU expired on March 13, 2005, and the County was once again fully authorized to abandon the line. [8] *Id.* Tab C at 2.

On May 2, 2005, Butler County Economic Develop ("BCED"), late-filed a request for the issuance of a second NITU.[10] *Id.*, Tab D. Because the County had not yet abandoned the line and agreed to negotiate a railbanking agreement, the STB issued new NITU on June 2, 2005. On June 3, 2005, the county and BCED executed a trail use/railbanking agreement for the line.[11] *See* Def. Ex. 21.

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[10] In Aban. and Discon. of R. Lines and Transp. under 49 U.S.C. § 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the STB retained the policy of accepting filings after the due date when good cause is shown.

[11] Defendant has been informed by BCED that BCED plans to request a voluntary partial revocation of the NITU. However, as of the date of the brief, no such request has been filed with the STB. Defendant raises this issue to alert the Court that, in the event the Court concludes Defendant is liable for a permanent taking on the facts presented, a partial revocation of the NITU would render that taking temporary. No temporary

(Continued on following page)

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[12]

2. The Pankratz Plaintiffs' Takings Claims Accrued on June 2, 2005

In their first Amended Complaint, the Pankratz Plaintiffs alleged that a taking of their property "occurred when the STB issued the NITU on June 1, 2005." Pankratz Amended Compl. ¶ 29. Plaintiffs subsequently sought leave to "amend the date of the Notice of Interim Trail Use to reflect the original Notice of Interim Trail Use issued by the Surface Transportation Board on September 13, 2004. (Currently the Complaint references the STB's extension of this NITU, which occurred on June 1, 2005)." Pankratz Pls.' Mot. for Leave to Amend at 2 (Apr. 10, 2008) (Doc. 28). Contrary to Plaintiffs' assertions, the second NITU by the STB was not an "extension" of the original NITU but a new NITU issued after a lapse in time when initial Trails Act negotiations had failed. As explained below, there is a gap in time between the two NITUs during which there was no regulatory restriction that precluded the County from abandoning the subject rail line. Plaintiffs' analysis improperly ignores this fact.

Specifically, as a result of the Notice of Exemption filed by Butler County with the STB, the County was authorized to abandon the subject rail

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takings claims have been made and do not presently exist and therefore, Defendant will not address the merits of any such claim.

line as of August 4, 2004, when the Notice of Exemption became effective. Pankratz Pls.' Proposed Facts, Tab C (Doc. 33-2) and Tab M (Doc. 33-3). A potential trail operator, PTI, subsequently requested the issuance of a NITU. At that point, the County indicated that it had not exercised its authority to abandon the line, and that it was willing to negotiate for trail use with PTI. Accordingly, the STB issued the requested NITU on September 14, 2004. *Id.*, Tab C. That NITU provided the County and PTI until March 13, 2005, to negotiate a railbanking and interim trail use agreement. *Id.*, Tab C. If no such agreement was reached by that date, the NITU provided that "the County may fully abandon the [13] line." *Id.*, Tab C.

The County and PTI failed to reach an agreement. *Id.*, Tab D (Doc. 33-2). Consequently, the NITU expired and the County was once again authorized to fully abandon its line. *Id.* Accordingly, as of March 13, 2005, there was no longer any regulatory restriction in place that prevented the County from abandoning its rail line. This remained the case until June 2, 2005, when the STB issued a new NITU that authorized the County and BCED to negotiate a railbanking and interim trail use agreement. The County and BCED notified the STB that they had reached such an agreement on June 3, 2005, and the right-of-way has remained railbanked since that time. Def. Ex. 9 (Letter of June 3, 2005).

The Pankratz Plaintiffs assert that their permanent physical takings claims accrued on September 13, 2004, the date of the first NITU.[9] Pankratz Brief at 25-31. This assertion is premised on Plaintiffs' argument that, under the rulings in *Caldwell, Barclay* and *Renewal Body Works*,[10] takings claims arising under the Trails Act accrue "upon the STB's issuance of the *original* NITU." Pankratz Brief at 29 (emphasis added). However, Plaintiffs' analysis fails to consider the lapse of time between the expiration of the first NITU and the issuance of the second NITU, and the fact that two different trail sponsors were involved. These facts distinguishes this case factually from the decisions relied on by Plaintiffs.

In *Caldwell,* the "original" NITU was issued on August 31, 1994, for 7.4-mile segment of [14] a railroad right-of-way. 391 F.3d at 1231. Prior to the expiration of the 180-day negotiating period, the parties filed for an extension of time to continue their negotiations and also asked that the NITU be extended to

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[9] There is no temporary takings claim presently before the Court in this case. The Pankratz Plaintiffs did not allege a temporary taking of their properties based on the first NITU (issued September 14, 2004) in their Second Amended Complaint, nor have they moved for summary judgment with respect to such a claim. Accordingly, Defendant has not attempted herein to address the merits of such a claim.

[10] The separately filed appeals in *Barclay v. United States* and *Renewal Body Works, Inc. v. United States* were consolidated before the Federal Circuit for oral argument and decision. *See Barclay*, 443 F.3d 1368 (Fed. Cir. 2006).

cover an additional 3.2-mile segment of the same right-of-way. *Id.* The STB granted both requests and, on June 2, 1995, issued a new NITU that consolidated the proceedings involving both segments. *Id.* Having determined that the *Caldwell* plaintiffs' claims accrued on the date a NITU is issued, the Federal Circuit held that the plaintiffs' claims were barred by the applicable statute of limitations because both NITUs were issued more than six years before the plaintiffs filed their complaint. *Id.* at 1235.

In *Barclay,* the plaintiffs sought to avoid the dismissal of their claims as time-barred under *Caldwell* by arguing that the original NITUs issued for the "Flint Hills" trail were vacated and that a second taking occurred when a new NITU was issued naming a new trail operator. *Barclay,* 443 F.3d at 1374. After explaining that the substitution of trail users is contemplated as part of the railbanking, the court rejected the plaintiffs' claim accrual argument, noting that "[t]here is no gap between the original and replacement NITUs. Though formally 'vacat[ing]' the original NITUs, the STB makes clear that, in substance, it is 'substituting' trail users 'in the [same] proceedings.' " *Id.* at 1375. Accordingly, the *Barclay* decision clarifies that "any extensions or modifications of the original NITU [are] not separate potential takings."[11] *Id* at 1376.

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[11] The *Barclay* court reached the same conclusion as to the Sunflower Trail, where a request to extend the negotiating

(Continued on following page)

In contrast to the factual scenarios presented in *Caldwell* and *Barclay,* the first NITU issued in *Pankratz* expired according to its terms on March 13, 2005. As a result of the [15] expiration of that NITU, with no pending request for an extension of the negotiation period, the railroad was fully authorized to consummate abandonment of its rail line as of March 13, 2005. As the Federal Circuit explained in *Caldwell,* under these circumstances, any takings claim that accrued with the issuance of the first NITU was, at most, a temporary one. *See Caldwell,* 391 F.3d at 1234 ("negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred."). *See also* Creppel v. United States, 41 F.3d 627, 632-34 (1994) (finding that the government's regulatory actions involving the plaintiffs' properties gave rise to a temporary takings claims preceding and separated by a 4-month gap from a permanent takings claim)

Although the County was authorized to fully abandon, it did not exercise that authorization and consummate the abandonment. Instead, approximately 2½ months after the original NITU expired, the

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period and substitute a new trail operator was filed on the date the original NITU was set to expire. The court rejected the argument that the NITU issued in response to this request (which came 10 days later) resulted in the accrual of a new takings claim, and found instead that the second NITU "in substance merely extended the original NITU." *Id.* at 1376.

County – acting through its Economic Development office – requested the issuance of anew NITU. Def. Ex. 6 (Letter of Apr. 4, 2005); see also Def. Ex. 7 & 8 (Letters of May 16 and May 23, 2005). The STB issued a new NITU on June 2, 2005, a Trails Act agreement was reached, and the 10.6-mile right-of-way is now railbanked. Accordingly, under *Caldwell*, the second NITU gives rise to a potential permanent takings claim. *See Caldwell*, 391 F.3d at 1234 ("the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked").

In sum, any takings claim that accrued with the issuance of the first NITU was rendered temporary when that NITU expired according to its own terms on March 13, 2005. After that date, there was no regulatory restriction in place that affected, in any way, the County's right to fully abandon its lines or precluded the vesting of any state law reversionary interests. *Caldwell*, [16] 391 F.3d at 1233-34. The subsequent issuance of a new NITU on June 2, 2005, which resulted in a railbanking and interim trail use agreement, thus gives rise to a permanent takings claim that relates back (and accrues on) June 2, 2005. Accordingly, the correct claim accrual date for the permanent takings claims alleged in Plaintiffs' Second Amended Complaint and on which Plaintiffs

have moved for partial summary judgment is June 2, 1995, the date on which the second NITU was issued.

* * *

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

JACK LADD AND MARIE LADD ET AL.,	)	
Plaintiffs,	)	
v.	)	Docket No.: 02-271L
UNITED STATES,	)	
Defendant.	)	

Courtroom 7, Room 508
National Courts Building
711 Madison Place, N.W.
Washington, D.C.

Tuesday, May 19, 2009

The parties met, pursuant to notice of the Court, at 10:06 a.m.

BEFORE: HONORABLE ROBERT H. HODGES, JR. Judge

APPEARANCES:

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* * *

[4] MS. JACKSON: That's okay. Ms. Fisher isn't here. Ketanji Jackson of Morrison & Foerster on behalf of Rails to Trails Conservancy.

THE COURT: Okay. All right, Ms. Jackson. Morrison & Foerster?

MS. JACKSON: Yes, sir.

THE COURT: Okay. Well, this is a case that has haunted me for some time, and I apologize once again for not having disposed of this before now. I think I told you on the phone we have an opinion ready to go. The problem is we're just not quite satisfied that it's right frankly. The case has subtleties to it that keep reappearing, and as you folks well know, there's no case quite like this one, which we think makes a

big difference in the facts of this case that we find make the case law that's out there sort of unhelpful in some respects or worse than unhelpful in fact.

So I'm hoping that perhaps you folks who have lived with it a lot longer than I have will be able to help me get some of these issues straightened out. I may go a little bit out of normal practice on occasion to ask for direct comment on a particular assertion if you don't mind. I told the clerks earlier that I don't normally do that, and it seems.

* * *

[38] [MR. HEARNE:] So even though in that case we have a group of people who owned the land when the trail was built and they had no compensation and were excluded from the case. But the people who owned the land on the date the NITU was issued, even though they no longer owned it when the trail was built, were fully compensated because it was their reversionary interest that was taken.

So that's why I say this case seems novel in the sense that, no there's not a trail there, but it isn't at all novel on the fundamental issue which is common to every trails case, which is the taking of reversionary interests is the feature of the compensatable interest. When we focus on that, *Caldwell, Barkley, Preseault,* all the cases make sense at least to me. It's when I try to separate the two concepts and look at the trail as a feature of the taking that it becomes a little more muddled.

THE COURT: Muddled is a good way to describe the problems that we had. You have a better computer than I do, I had forgotten about *Carl Junction*. But you say it was stipulated there, that – doesn't sound like I published it, is that right?

* * *

[58] THE COURT: I guess the difference would be that *Tahoe* was a regulatory taking, but you're saying that's what this is too?

MR. GETTE: That's what this is too. We have no physical occupation, the sole action of the government was to say, everybody take a breath, hold off on any further development, the government did not enter the property, the government never granted anyone the authority to enter the property. The only party that has the authority to enter the property is the Railroad, and that derives from the easement that they were granted 100 years ago.

* * *